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November, 1960

VOLUME 46
No. 11

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American Bar Association JOURNAL

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.

Second class postage paid at Chicago, Illinois.

Price per copy, 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00; to Members of the American Law Student Association, $1.50.

Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

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The President's Page

Whitney North Seymour

First, let me revert to our English and Commonwealth visitors who gave us so much pleasure at the Washington meeting, and in their subsequent visits to other cities. Literally thousands of our members participated in this fine enterprise. Undoubtedly, it resulted in making an equal number of new friendships which will be treasured and renewed. I had the pleasure of seeing many of the visitors just before they left for Canada or home. I do not believe it was just the superlatively good English manners which made them so unanimously enthusiastic about the hospitality they received. In a final talk with the Lord Chancellor, we agreed that the Bar should not wait a generation for the next visit and that all of us could recover sufficiently from the rigors of the last one and have some chance of participating in the next, if we spaced them in future at ten or twelve year intervals.

This experience suggests that we should try to expand relationships with other lawyers outside the United States. In order to advance the rule of law in the world, we should encourage interchange with lawyers who believe in freedom and the dignity of man as we do. The International Commission of Jurists, whose work has been supported by the Association and some of its members since its creation, is doing fine work in encouraging support for the rule of law within nations. Its reports on Hungary and Tibet are among the most effective indictments of Communist brutality in disregard of the rule of law. A conference under the auspices of the Commission will take place in Africa early in 1961 and leading American lawyers will participate. Further ways to assist in the work of the Commission should be found.

The Committee on World Peace Through Law, under the muscular leadership of former President Rhyne, is actively pushing its program for advancing the rule of law among nations and it will be developing many relationships with lawyers abroad during the years ahead. One or more of the projected conferences of lawyers on a continental basis will probably be held rather early in 1961.

There also appears to be room for various more modest efforts. For many years, Chief Justice Simmons, of Nebraska, with the aid of others, has been collecting American law books and providing them to lawyers and judges abroad. I understand that between 1953 and 1959 books were obtained from 269 donors in thirty-seven states and that 23,598 books were shipped to four countries. This is an imaginative contribution to common understanding of legal systems which could well be expanded.

There appears to be no completely organized system for assisting lawyers and judges visiting the United States to see bar associations, courts and other facets of our professional life. There have been many successful visits and no doubt *ad hoc* planning has often been reasonably adequate. It would appear, however, that an organized program for such trips, in which the American Bar Association would cooperate with the governmental or private institution responsible for the visits and with state and local associations which could supervise local plans, would be extremely desirable. The lawyers among the delegations from new nations admitted to the United Nations should be encouraged to get to know our legal institutions and to share in the spirit of comradeship in our organized Bar. It would be desirable to encourage support for an extension of the Association's activities in this field which is under the supervision of a distinguished committee of which Federal Judge Stephen S. Chandler of the Western District of Oklahoma is Chairman.

Another possible activity of the Association was developed by experimentation at the Washington meeting. At that meeting, the Junior Bar Conference and the American Law Student Association ingeniously ran a pilot project to determine interest in a placement bureau for lawyers. They received applications from lawyers who wish to change their location and association and also from employers who were interested in obtaining additional legal help. Rather to the surprise of the sponsors, there turned out to be more than 500 registrations in the few days the project was operating. The Board of Governors will consider a recommendation, in which I shall heartily join, that the permanent maintenance of such a placement bureau for our members would be a desirable addition to our service. Only the rare law school placement bureau could render anything like the service to its graduates which such a national bureau could provide for our members. If a final decision is reached to establish such a service it will be announced with full details in the *Journal* and elsewhere.

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Two Ways of Saying "Thank You"

I write to you . . . to express to you all my personal appreciation of the magnificent arrangements and hospitality afforded to all those from England who were fortunate enough to be in Washington.

I remember asking my mother how I should write a letter of thanks after a week end with friends.

"JackMaryBobPeter" she said (she had four children and always worked on the "hit-and-can't-possibly-miss" principle), "There are two ways of writing such a letter—you can say '*I* had a wonderful time; *I* do thank you for all the arrangements; *I* think the house is lovely', or you can say '*You* really are magnificent hosts, and the arrangements *you* made for my enjoyment were wonderful; *your* kindness and thoughtfulness made the visit a memorable one'. Both letters are adequate", she said, "but it is the second one which gets the repeat invitation."

Ladies and Gentlemen of the American Bar Association, you are magnificent hosts. . .

PETER HARRISON

Hove, England

How To Obtain Proof When a Letter Was Mailed

Mr. Nielsen's article in the September issue of the *Journal* entitled "Post-Dated Postmarks, Or, How To Mail a Letter Yesterday", is quite interesting. It brings to mind the age-old question of proving the correct date, day and hour a letter was really mailed.

When a matter of this kind is raised in a court action, there is no positive evidence that can be presented that a certain letter really came in the post-marked envelope presented.

You will note that this letter to you carries the positive proof that this letter was mailed at the time shown by the post-mark.

Sometime ago I mailed to myself a number of letters using this idea of identification to establish the fact that the idea was original with me.

You will note that the window in the upper righthand corner of the envelope enables the writer to place the postage stamp and post-mark on the back of the letter enclosed. A letter so stamped and post-marked goes into the file with full evidence of the day and hour it was mailed. This type of envelope will also provide that the postage stamp and post-mark will be preserved for future stamp collectors.

Now, if Mr. Nielsen's bright young lawyer can sell this idea to the world, the American Bar will be saved a lot of worry.

S. H. MATHEWS

El Cajon, California

The Comptroller General on Metered Postmarks

Mr. Nielsen concludes his amusing article, "Post-Dated Postmarks, Or, How To Mail a Letter Yesterday" (September issue), by stating that he has ". . . been sitting around for three or four years waiting for some bright lawyer to steal [his] idea or at least raise the issue in court."

Frankly, I never realized very many lawyers would be careless enough to attach to a metered postmark, which is patently under the control of the individual who rents the postage meter, the aura of officiality which is traditionally attached to a post office postmark, which is stamped by hand or by machine by a postal employee in the course and scope of his official duty.

However, the Comptroller General has recently met the problem, so Mr. Nielsen's vigil may be concluded. To make a longer story shorter, the Comptroller General has recognized that, in government procurement bidding cases, a metered postmark neither establishes the *time* of day of mailing nor, without evidence *aliunde*, the date. Comp. Gen. B-143661 (August 12, 1960); Comp. Gen. B-143772 (September 1, 1960). See also the discussion in 2 Government Contractor Para. 459. The Federal Procurement Regulations also imply the distinction. See §1-2.303-3(a)(1), (6).

MARION EDWYN HARRISON

Washington, D. C.

Minimum Wages Are Too High

Mr. I. F. Friedman, in the July, 1960, *American Bar Association Journal*, said, "This reader cannot envisage the act ever affecting the very small, purely local business."

If Mr. Friedman had been representing very small and what I call purely local businesses in wage and hour matters, he would find that the act already affects many of those businesses; and under the proposed bills now in Congress and already passed by the Senate, many others will be covered. The Senate bill will cover industries "engaged in activities affecting commerce". What industry doesn't, including the practice of law?

There has been a creeping extension of the coverage in the wage and hour law, and there are further extensions coming. The unfortunate part of this whole business is that the very people the law is designed to help are the ones who suffer. All one needs to do is check with the Commerce Department on the importing of products this country

(Continued on page 1156)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $20.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $5.00 per year, and for three years thereafter $10.00 per year, each of which includes the subscription price of the *Journal*. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $20.00 for lawyers first admitted to the Bar in 1955 or before; $10.00 for lawyers admitted in 1956, 1957 and 1958; and $5.00 for lawyers admitted in 1959 or later.

Manuscripts for the Journal

■ The *Journal* is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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(Continued from page 1152)

once produced in tremendous volume. Why is it that in 1957 foreign countries produced more automobiles than this country? Why is it they are producing steel and shipping it over here cheaper than we can produce it? These questions could be asked almost ad infinitum. The answer lies in artificial costs of production, meaning artificial wage rates and high taxation.

As long as we have any semblance of a free economy, the minimum wage law will be a fallacy. The only way it can operate as its proponents intend, is to have an absolutely totalitarian system of wages and prices, both minimum and ceiling.

BROOKS L. HARMAN

Odessa, Texas

Kudos for the Article by Mr. Pittman

You will perhaps identify the writer hereof as the man who in 1953 first proposed a national commemoration of the 200th anniversary of the birth of the great Chief Justice John Marshall. Such a proposal was presented to the Bar Association of the District of Columbia and the fact was noted in the pages of the *American Bar Association Journal* at the time.

Permit me now to thank you for the publication in the August, 1960, edition of the *Journal* of the article entitled "Equality versus Liberty: The Eternal Conflict", written by R. Carter Pittman, of Dalton, Georgia. I consider this one of the most significant essays touching a vital proposition of law and government that I have ever read. In expressing to Attorney Pittman my appreciation of it I remarked as follows:

> What a pity it is that in this latter day, when sources of correct information ought to be available to all, perversions of truth should be circulated even in the highest quarters and believed by persons who ought to know better! The bare bones of what you have written can be understood by any schoolboy. Your researches into the background of fact and logic deserve the commendation of all thoughtful men.

To this let me add that I should count it a service to the nation if Mr. Pittman's article could be reprinted in pamphlet form and given the widest possible circulation. If such republication shall be undertaken by you or anyone else I should like to be informed.

PETER F. SNYDER

Washington, D. C.

More Praise for Mr. Pittman

I was tremendously impressed with the well written and scholarly article in the current issue of the *American Bar Association Journal* entitled "Equality vs. Liberty: The Eternal Conflict", by R. Carter Pittman.

Mr. Pittman, by his writings, is clearly not only a legal and historical scholar, but he has that very rare faculty of making an article of such

(Continued on page 1158)

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(Continued from page 1156)

importance very readable.

I hope he can be persuaded to contribute additional articles to the *Journal*.

BEN R. MILLER
Baton Rouge, Louisiana

Pittman Article Was "Encouraging"

We wish to commend your *Journal* for publishing Mr. R. Carter Pittman's treatise, "Equality versus Liberty: The Eternal Conflict", in the August, 1960, issue.

In the fields of history and jurisprudence it is indeed encouraging to read a treatise whose documentation amply attests the accuracy of its contents.

GEORGE W. ANGERSTEIN
Chicago, Illinois

The Sachsenspiegel *on Equality*

Mr. Pittman's article in the August issue, concerning the phrase "all men are created equal", omits a principal and original source of this expression. The author is from Georgia, and he writes at a time when our prejudices make suspect the motivation for any comment on this subject. For this reason the reader's attention should be directed to the Congressional Library exhibits, of some years ago, of the leading sources of Declarations of Human Rights. One of the earliest documents included, better known to the Founding Fathers than to us, was the Saxon Spiegel *(Sachsenspiegel)*, A.D. 1221-4.

This basic German law treatise was the product of Eicke von Repkow (Repgow), who was urged by his neighboring barons to draft and publish a code of law. After condemning servitude *(Leibeigenschaft)* as having its origin in coercion and unrighteous force, "an unjust custom now accepted as right", Eicke sets forth the principle that "Equality of man before God must lead to equality of man before the law". He was considering freedom; his thesis was the administration of justice. This work was the basis for the law of most of the self-governing bodies of central and eastern Europe, as far east as Poland and Kiev, and south to Bavaria, for example, the Law of Magdeburg. The principle is best illustrated by the story of Frederick the Great and the miller who owned a mill near the Potsdam Palace which Frederick wanted to buy. When the miller refused to sell it, the king threatened to seize it. The miller told him, his majesty would not dare to do so because his courts would protect the miller.

Franklin Salisbury in *Speaking of Politics* discusses "*equalitarian*", sometimes "snobbishly spelled 'egalitarian' ". He observes that the Christian can accept equality in things of the spirit while recognizing inequality in material affairs. (Does not the parable

of the talents illustrate this?) He also comments that equalitarians are seldom consistently so.

JOHN W. BRABNER-SMITH

Washington, D. C.

More on Capital Punishment

In the June, 1960, issue of the *Journal*, reader A. O. Colburn asks Mr. Henry (author of "The Closing Argument for the Defense", *Journal* for January, 1960) whether he did wrong in "persuading the jury to give" a verdict for the death penalty in the case of two brothers whose holdup of a bank resulted in the fatal shooting of a bank customer.

Here were two brothers who had problems . . . they needed money, or they wanted "adventure". At any rate, in seeking what to their warped minds was a solution, a second and more immediate problem presented itself, in the form of an unexpected customer. Their solution to THAT problem was to kill the object of the threat.

The brothers then became the problem of what Mr. Colburn calls "civilized society", represented by the jury. Ask yourself, Mr. Colburn, did you do wrong in persuading the jury to solve its problem by killing the object of the threat which you described to it so well?

Why didn't you add to your argument as a punch line your basic premise, "Besides, how else are you going to teach them anything?"

TENLEY M. JONES

Teheran, Iran

International Law Society Wants Reservation Repealed

It has been brought to my attention that my article on "United States Policy Regarding International Compulsory Adjudication," which appeared in the August issue of the *American Bar Association Journal* may have conveyed the impression that the views expressed therein are associated with those of the American Society of International Law, of which I am Executive Secretary. Since the statement had already been published in the *Journal* and elsewhere that the Society advocates the withdrawal of the Connally

ANNOUNCEMENT

of the

1961 Ross Essay Contest

Conducted by the

American Bar Association

Pursuant to the terms of the bequest of Judge Erskine M. Ross, deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted: On or before April 1, 1961.

Amount of Prize: Three Thousand Dollars.

Subject To Be Discussed:

"WHAT PRINCIPLES AND PROVISIONS SHOULD BE INCORPORATED IN A CODE OF ETHICS FOR ADMINISTRATIVE AGENCIES, AND IN WHAT MANNER SHOULD THE CODE BE IMPLEMENTED?"

Eligibility:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1961 (except previous winners, members of the Board of Governors, officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

Instructions:

All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the

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AMERICAN BAR ASSOCIATION
1155 East Sixtieth Street **Chicago 37, Illinois**

Reservation to the United States' acceptance of the compulsory jurisdiction of the International Court of Justice, I assumed that my expression of a contrary view could only be considered as a personal one, as it is in fact. I should like to make it clear, at this time, that the opinions expressed in my article are my personal ones only and are not in accord with those expressed by the members of the American Society of International Law at its annual meeting in May, 1959, when it was voted to record as the sense of the meeting that the members warmly associated themselves with the recommendation of the Committee on Study of Legal Problems of the United Nations that the United States withdraw its reservations to the acceptance of the Optional Clause of the Statute of the International Court of Justice. The members of the Society at the annual meeting in April, 1960, reiterated their full accord with that conclusion.

I should appreciate your publishing this statement in the *Journal* so that there may be no misunderstanding by the readers of the *Journal* as to the views of the American Society of International Law.

ELEANOR H. FINCH
Washington, D. C.

Privity Under the Fire Statute Burden of Proof

What is known in admiralty law as the Fire Statute, 46 U.S.C., §182, reads as follows:

> Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

The "design or neglect of such owner" must be his personal neglect. In the case of corporations, it must be the design or neglect of some executive or managerial officer of the corporation in control of those activities which caused the fire. *Walker* v. *The Western Trans-*

portation Co., 3 Wall. 150, 18 L. ed. 172; *Consumers Import Co.* v. *Kabushiki Kaisha*, 320 U. S. 249, 88 L. ed. 30.

In such a case the corporation is held to be "privy" to the cause of the fire, and therefore liable. In short, it is the old doctrine of "privity" or *personal* fault, familiar in the limitation of liability cases under 46 U.S.C., §§183 *et seq.*

> The same rule is applicable to the words "privity or knowledge" in §4283 (46 U.S.C. §183) *Craig* v. *Continental Ins. Co. of N. Y.*, 141 U. S. 638; 35 L. ed. 886.

But there the similarity ends. For there is an important difference between the two statutes. Under the limitation of liability statute, the shipowner, seeking to limit his liability, has the *burden of proof* to show that he was *not* privy to the cause of the loss or damage. Liability having been found against him, he has to prove that he was not personally to blame if he seeks to limit that liability. Naturally, since he seeks to limit a liability already found, he has the burden of proving his right to the limitation. *Coryell* v. *Phipps*, 317 U. S. 406, 87 L. ed. 363; *In re Reickert Towing Line*, 251 Fed. 214.

The Fire Statute is quite different. There the shipowner has no such burden of proof. On the contrary, that burden is on the person seeking to hold the shipowner liable for the fire. He must prove that the shipowner was privy to the cause of it. The two statutes in this respect are diametrically opposed. Thus, in the Fire Statute cases, it has been stated:

> The primary law (the Fire Statute) is, therefore, one of non-liability, except under the conditions stated. From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from fire, the burden is on those asserting that the fire was caused by the shipowner's design or neglect to prove it, and, indeed, the authorities are to that effect. [*The Strathdone*, 89 Fed. 374.]

The statute provides immunity for the shipowner from liability for fire damage to cargo "unless such fire is caused by the design or neglect of such owner" (authorities). As there is no claim or reason to believe that the

(Continued on page 1168)

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fire was caused by the design of the owner, the issue is narrowed to whether or not it was caused by the owner's neglect. The burden of proving that the neglect of the owner did cause the fire rested upon the libelants... [*Hoskyn & Co.* v. *Silver Line*, 143 F. 2d 462, 463.]

It is well settled that a shipowner is not liable for damages resulting from fire unless libelant proves that the cause of the fire was due to the "design or neglect" of the owner, the burden being upon libelant. [*Fidelity-Phenix Fire Ins. Co.* v. *Flota Mercante Del Estado*, 205 F. 2d 886, 887.]

The burden of proving that the shipowners were guilty of "design or neglect" is, under the statute, cast upon those who allege it—the libelants... [*The Cabo Hatteras*, 5 F. Supp. 725, 728.]

To deprive the owner of the benefit of this statute, the claimant must prove (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent... [*Connell Brow. Co.* v. *Sevenseas Trading & Steamship Co.*, 111 F. Supp. 227, 229.]

And 3 Benedict's *Admiralty*, 6th Edition (1959 Supplement) page 55, says:

> The burden of proof that the fire was caused by the design or neglect of the owner is on the libelant.

It is surprising, therefore, and regrettable, to find the Court of Appeals for the Second Circuit fall into the error of stating that:

> Once negligence has been shown the burden of proof of coming within the exemption from liability of the Fire Statute, just as in the similar exception in the limitation statute, 46 U.S.C. §183, is on the owner. [*Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68, at page 71.]

The authorities cited for this statement do not support it at all. Two of them are limitation of liability cases, and the other is a footnote to the text of Gilmore and Black's *Law of Admiralty*. But the footnote does not say that the law *is* as stated by the court. It only says that, in the opinion of the authorities, it *should* be.

This fails to perceive the essential difference between the two statutes. The limitation statute is a law of *limitation*. The Fire Statute is a law of *exoneration*. The limitation statute concedes that liability has been established, but then allows the shipowner to limit that liability by proving that he was not privy to it. It abolishes the rule of *respondeat superior*. Since it gives the shipowner this privilege, it is only right that the burden of proof should be on him to prove that he is entitled to it.

The Fire Statute, on the other hand, being a statute of exoneration, lays down the condition which the libelant must meet to hold the shipowner liable. It is, as said in *The Strathdone, supra*, a law of "non-liability, except under the conditions stated". One of those conditions is that the fire must have been caused by the personal design or neglect of the shipowner. This is a necessary element in libelant's or plain-

tiff's case. His right is founded on it. He must prove it, just as the plaintiff must prove scienter in a vicious dog case, or malice in certain types of libel cases, or the blow in an assault case, or any fact in any other case where the law establishes such fact as a basis for the right.

It is to be hoped, therefore, that the courts will take a careful look at the Second Circuit decision before following it.

ERSKINE WOOD

Portland, Oregon

Lectures on Magna Charta To Be Arranged

The American Bar Association took a great part in the establishing of the commemoration of Magna Charta by the festivals each three years at Magna Charta "sites". The last commemoration was at Bury St. Edmunds, and part of the celebration was a wonderful pageant which was written by Canon R. Tydeman of All Saints Vicarage, Newmarket, Suffolk.

Canon Tydeman is planning to visit the States, and wonders if some bar associations would be interested in getting him invitations to lecture in various cities on the Magna Charta celebration at Bury St. Edmunds, illustrated by film strips?

The programs offered are:

I. Magna Charta, Our Common Heritage. The history and significance of the great Charter with particular reference to the part played in that history by the Abbey of St. Edmundsbury. Lecture illustrated by colored slides, or by 16 mm colored sound film made of the Bury St. Edmunds Pageant of Magna Charta 1959.

II. English Drama and Pageantry. Tracing the history of drama in England from twelfth century liturgical drama, through the medieval mystery and miracle plays, to Shakespeare, and on to the present day. Illustrated by readings from selected plays. (The pageant film may also be shown with this lecture.)

III. The Passion Play of Oberammergau. This famous play has been performed every tenth year for more than three centuries, in a village in southern Germany. Canon Tydeman, who has studied the history of the play, attended the first performance of the

1960 production as representative of the British Broadcasting Corporation. Lecture illustrated by more than eighty colored slides of Oberammergau and district, and of the play itself.

The tour is now in process of being planned and definite reservations have been booked by air—

February 1-15 for the area around New York.

February 15-28 for the Middle West.

February 28-March 15—Boston and the New England States.

Would it be possible to give this information to your readers through your *Journal?* I should be most grateful for any help you can give to Canon Tydeman.

THOMAS DUNWICH,
Lord Bishop of Dunwich

Stonham Aspal
Stowmarket, Suffolk
England

The Germans Have an Answer

As I was reading Mr. Nielsen's article in the September, 1960, issue entitled "Post-Dated Postmarks, Or, How To Mail a Letter Yesterday," the mailman delivered a letter from Germany. I enclose the envelope. You will note that the cancellation of the sender using a postage meter is in red, while the cancellation of the German post office is in black, and is a day later.

In case of litigation the black print of the postal authorities should be decisive as to when the letter was mailed.

GEORGE C. DIX

New York, New York

Safeguards in Lieu of the Connally Amendment

As no member of the House of Delegates had an opportunity to speak at the "great debate" on the Connally Amendment except those chosen by each side, and no member of the Association had an opportunity to speak on this subject at the Assembly the following day, I suggested to both sides that they study and suggest to the House of Delegates at the Midyear Meeting alternate safeguards in lieu of the Connally Amendment, which was opposed largely because of its "self-judging" character.

I suggested that no objection had been raised to the safeguards of our principal allies, Great Britain and France. The British, for example, exclude disputes having reference to any hostilities or military occupation in which the United Kingdom is or has been involved; disputes where the other party has accepted jurisdiction only in relation to or for the purpose of the dispute; disputes where the other party has accepted compulsory jurisdiction less than twelve months prior to filing the application with the Court; and include a reservation of the right at any time to add to, amend, or withdraw any of the reservations.

I made these suggestions because it seemed to me there is a growing desire for safeguards for our Constitution, especially in domestic affairs. This appears from the House of Delegates' support of the Bricker Amendment in 1952 and thereafter. This also appears

from the almost unanimous vote in 1947 against the Connally Amendment, whereas in Washington in 1960, the President of the United States threw the full weight of his administration against the Connally Amendment, yet the proponents of repeal won by only seven votes, with thirty not voting.

I made them for the further reason that it seems to me that with the Communists aiming threat after threat as well as insult after insult at this country, and with Khrushchev attempting to remake the United Nations in his own image, we should safeguard domestic issues.

Our two remaining safeguards after the repeal of the Connally Amendment, namely, our right to veto the enforcement of a judgment, and our right to withdraw from the Court on six months' notice, are surely as "self-judging" as the Connally Amendment, and would appear to be much worse in the eyes of other countries, since these actions would be taken after, rather than before, the Court assumes jurisdiction.

BENJAMIN WHAM

Chicago, Illinois

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A. James Casner, Director of the Program

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BUSINESS PLANNING	DAVID R. HERWITZ, *Professor of Law* (LOUIS LOSS, *Professor of Law*, will participate in the Business Planning problem which involves the SEC.)
CONTROLLING THE USE OF LAND	CHARLES M. HAAR, *Professor of Law*
ESTATE PLANNING	A. JAMES CASNER, *Weld Professor of Law*
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INTERNATIONAL TRANSACTIONS AND RELATIONS	MILTON KATZ, *Henry L. Stimson Professor of Law and Director of International Legal Studies*

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The Rule of Law Applied Between Nations

Mr. St. Laurent, the President of The Canadian Bar Association, addressed the Assembly at its third session, held Wednesday afternoon, August 31, during the Association's Annual Meeting in Washington.

by Renault St. Laurent, Q.C. • ***President of The Canadian Bar Association***

THE SUBJECT on which I wish to speak to you today is the rule of law, not as it is applied within any one country, but the rule of law applied between nations. I have chosen this subject because every year and every month and every day it seems to become clearer that if civilization is to survive, and perhaps if humanity itself is to survive in the world, the rule of law will have to be applied in relations between nations as effectively as it is now applied in relations between citizens within the boundaries of civilized nations.

There are, of course, many elements that go into the development of a civilized society, but most people would agree that any organized society must have two foundations. The first and most essential is undoubtedly religion as the basis of morality, and the second is law and the enforcement of law. These two foundations are so closely joined together that it is hard to imagine that either could long survive without the other. We all know from experience, from recent experience, that no system of law will work without a moral basis.

Unless the vast majority of those to whom a law is applied willingly accept the law because it is morally sound and obey it willingly, the law cannot be enforced in a free society. Indeed a law can never be enforced successfully unless those who want to break the law are a relatively small minority of the whole society to which the law is applied. That is undoubtedly why, in every organized society, the scope of positive law is much narrower than the scope of morality.

There have been attempts to erect societies in which the system of law is not based on morality, and societies in which the validity both of religion and morality are officially denied. But the vast weight of historical evidence suggests that such societies cannot long endure. Certainly the notion that law can be divorced from morality is a notion that is entirely repugnant to the conception of law in your country or in mine.

For historical reasons, both your country and mine recognize within their borders two different systems of law. In the greater part of the United States as in the greater part of Canada the system of law is founded upon the common law of England. But in one part of the United States (Louisiana), and in one part of Canada with a historical connection with Louisiana, the Province of Quebec, in which I have spent all my life, the system of law is based upon the civil law of ancient Rome.

I do not intend to enter into any argument as to which of these systems is superior, if indeed one is superior to the other. What we glory in, whether we are common lawyers or civilians, is the fact that our system of law is based upon right and justice which are both moral concepts. And, of course, in having two systems of law within our political borders, we in Canada and you in the United States are following the example of the United Kingdom, for there, too, the law of England is based on the common law, while the law of Scotland is based on the civil law of ancient Rome. It may well be that the very fact that, within the boundaries of a single political state, we have been able to accommodate two systems of law, has helped to create a broader spirit of understanding and tolerance in our people and a clearer recognition of the fact that more than one road can lead to right and justice. But this spirit of tolerance has never led us to believe that any system of law based on wrong or on injustice can be tolerable.

In ancient times, in the Middle Ages, and, indeed, in modern times right up until the end of the eighteenth century, the possibilities of extending the same rule of law over wide areas were strictly limited. Local differences between one community and another, between one nation and another, seemed to most men insuperable. The Roman Empire had broken down because its writ no longer ran throughout the whole Empire and the attempt in the Middle Ages to recreate a Western Empire as wide as Christendom had also failed because in fact, its writ did not run. Indeed the writ probably

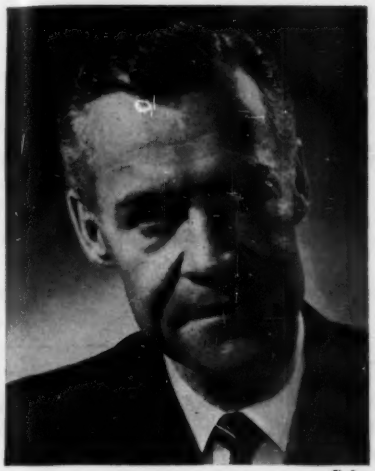
could not be made to run over wide areas of a centralized state unless that state was an efficient and unchallenged autocracy, and that is probably still true of many unitary states. Indeed, the orderly extension over a wide area of the rule of law was not achieved historically until the founding fathers of this great nation worked out one of the greatest political inventions of all time, the conception of federalism. Without federalism the United States could never have been extended from the Atlantic Coast across the continent to the Pacific, and without federalism the original thirteen states could probably not have been held together for any length of time. What federalism did was to make it possible for local matters to be dealt with by laws of local application, while the great matters of common concern to a large segment of humanity could be dealt with by a legislature whose writ would run right across the continent. When we in Canada set out to unite our country, the first attempt was to create a unitary state, a unitary state which would apply essentially the same set of laws, not only over a large area but over two peoples with different traditions and different backgrounds. This attempt at unity was on the verge of failure when the statesmen, and they were statesmen, of British North America, borrowed the American idea of federalism and applied it to the northern half of North America. In some ways we had a harder problem than you had. We had a poorer country, a smaller population and an almost impenetrable wilderness between the eastern and western half of our country, and in addition to all that we had two distinct peoples with two languages, two traditions, two cultures and a hereditary enmity between them. With federalism, we created a union over ninety years ago in which, as a Canadian, I am proud to say we are just as strongly united today as you are here in the United States.

The adoption of federalism in the United States at the end of the eighteenth century was a landmark in the history of human self-government. It was also a landmark in the extension of the rule of law. It seems to me that what humanity is crying for today is another breakthrough comparable with the invention of federalism. A breakthrough in political ideas which will make possible the extension of the rule of the law to the whole world.

Ever since the French Revolution and the Napoleonic wars disrupted the whole structure of Europe a century and a half ago, the Western world has been looking for some effective way to substitute law for force in the settlement of international disputes. The so-called "Concert of Europe" of 1815 was the first such attempt. The "Concert of Europe" failed because it attempted merely to maintain the status quo. It provided no machinery for change and no real safeguard of freedom. By the middle of the nineteenth century, force and war were once more accepted as the ultimate means of settling international disputes, and, indeed, as legitimate instruments of national policy. The result of this failure of the "Concert of Europe" was the First World War which began in Europe but which, before it was ended, had included most of the world and had drawn the United States out of its historic policy of isolation into a great effort of intervention on a massive scale. The immediate effect of the blood bath of 1914-18 was a yearning for peace based on international law and nowhere more than in the United States, in 1918 and 1919, did men of vision and good will seek some means of substituting the rule of law for the rule of force in the relations between nations. It was your President, Woodrow Wilson, more than any other one man, who created the League of Nations. This noble concept of Wilson's proved to have three weaknesses. The first weakness was that it was merely a league possessing no force of its own, and, in the final analysis, depending on the voluntary decision of its members for any collective action. The second was that having no police force, the ultimate method of stopping wars was by organizing collective warfare against an aggressor. But the third and most serious weakness was that the United States, which had had such a large part in creating the League, did not become a member.

Despite its basic weakness the League just might have worked if the United States had been a member, and a wholehearted member; but your people chose, in 1920, to turn back to the historic policy of isolation which had served them well through most of their history and which, after the terrible shock of 1918, must have seemed very appealing. However the American decision of 1920 left the world without the leadership of what had become its most powerful nation, and without strong leadership, the world drifted into international anarchy and within twenty years was engulfed in another and far more terrible war. Once again, in 1945, the victorious nations and their peoples were resolved to have an end of war, and to find the political means of substituting for warfare a system of international organization which would substitute legal processes for force in the settlement of international differences.

The United Nations, as it was created in San Francisco in 1945, was something more than a league but it was still a great deal less than a federation. The United Nations did, however, provide, in its Charter, for the creation of an independent force—an international police force. Unhappily, however, the task of creating the framework for such a police force was not completed at San Francisco. This task was left to the United Nations organization itself to perform. It was, in fact, the first duty of the United Nations. For the first three years of the existence of the United Nations, persistent efforts were made by the Western nations, and not least by Canada, to get such an international security force established. It was not until every possibility of success seemed to have disappeared, because of the systematic obstruction of one of the great powers, that the free countries of the West banded together in the North Atlantic Alliance as they had a right to do under the Charter of the United Nations. The North Atlantic Alliance was recognized by all its members as a second best, but all of them also recognized that collective action by the unaggressive nations offered the only immediate hope of security with freedom for their people. And it is hard not to believe that this collective action of the West really saved the peace of the world for a decade after 1949.



Gaby

Renault St. Laurent, Q.C.

We in Canada who are your nearest neighbors and who, therefore, have the best chance to observe what goes on in your country, and the best opportunity to judge why you do the things you do, are sometimes inclined to criticize some of the things you do. When we criticize you, we criticize you as neighbors, as neighbors and friends. Whatever criticism we may have from time to time is a criticism of method and of detail. When it comes to the fundamentals, the things that really matter, most thoughtful Canadians are deeply grateful for the course the United States has followed in world affairs since 1945. You turned your back on the deceptive isolation of 1920. You helped to create the United Nations and you have borne your full share of responsibility in that world organization from the very beginning. When the position of the free world in the Eastern Mediterranean was at stake; when Greece and Turkey were menaced by the Communist domination which had overtaken Czechoslovakia, the United States stabilized the situation with the Truman Doctrine. You sustained Western Europe and gave a foundation to its economic recovery through Marshall aid. You had the courage to draw a firm line to Communist aggression in Korea. Your great public men alike under President Truman and President Eisenhower, have been able to rise above party differences to discharge unitedly the international responsibilities of your country as the leader of the free world. Canada, your closest neighbor, provides the clearest proof to the world—a living proof—that there is no aggression in your designs and not the slightest danger to any peace-loving people, in your strength. For a century, our two countries have been living side by side, one with ten times the population and more than ten times the wealth and strength of the other, and they have lived together in peace and in growing harmony.

It is not easy to think of any other situation anywhere in the world where two countries with such unequal strength are situated side by side and where the weaker country has nothing to fear from the stronger, except the hazy—and I am convinced unfounded—fear that the stronger may not continue to give leadership in the common cause.

Looking out on the world today, there are perhaps two ways in which a catastrophe of worldwide destruction can be avoided. One way would be by the submission of all the peace-loving nations to abject slavery under a single power bent on world domination. Such a course would obviously be more repugnant to all men and women brought up in our Western tradition of freedom and with our Western concept of the rule of law than annihilation itself. The other course is to maintain, resolutely but unprovocatively, sufficient strength in the free world to deter any potential aggressor, and, at the same time, to search equally resolutely and unprovocatively for the means of accommodation and eventual understanding between nations. But what kind of accommodation would be acceptable to the free world? Surely, the only basis of accommodation which could possibly give us any assurance of peace would be an accommodation based upon the universal acceptance of the rule of law in the relations between nations or, at least, the acceptance by all the great powers of the rule of law in their relations with one another. But the mere acceptance in principle of the rule of law would not be enough. The will and power to enforce international law must also be created and that, in turn, would seem to require two further developments: the disarmament of individual nations, on the one hand, and on the other hand, the establishment of international organizations sufficiently strong to nip in the bud any move toward aggression, even by the greatest powers. With anything less, how can there be security for this or succeeding generations? Indeed there is little assurance of the survival of humanity. Modern science has created such terrifying power, such overwhelming destructiveness, that the use of force to settle international disputes has really ceased to be a practical proposition; resort to force and the counter-force which could be used against it would be almost universally destructive. What we have today is an unstable balance of terror. Yet no great nation is going willingly to give up its own forces without the assurance that its neighbors like itself will be subject to a rule of law, and subject to a rule of law which is enforceable. In other words, national disarmament and the rule of law between nations must come hand in hand.

Your own Special Committee on World Peace Through Law has pointed out, in its booklet on *The Rule of Law Among Nations*, both how lawyers can contribute to its worldwide acceptance and the grim alternative of possible universal ruin. It is recognized everywhere that "lawyers are especially qualified by their training and experience to analyze problems of human relations and to find practical means of solving these problems without resort to violence". Should we not, therefore, individually and collectively, accept a special responsibility to do our full part to help in bringing about, throughout the world, such conditions of public opinion as will secure "the predominance of law as opposed to arbitrary power in international relations"?

Would this not be as great an advance in the field of human relations and human welfare as the marvelous discoveries of the last decades have been in the field of scientific achievements?

The Army's Field Judiciary System: A Notable Advance

Colonel Wiener describes the Army's new system of appointing courts-martial which has now been in effect on a world-wide basis for a year. The system is a far-cry from the "drum-head" justice of the old days and, although the other services have not yet fully accepted it, Colonel Wiener predicts its ultimate adoption by them.

by **Frederick Bernays Wiener** • *of the District of Columbia Bar (Washington)*

THE ARMY NOW has a full-time independent judiciary, composed of judicial officers whose sole duty it is to act as law officers in trials by general court-martial, and who are not under the command of any person who recommended trial, who ordered trial, or who will review the record of trial in any capacity. There will be no more *ad hoc* law officers, appointed by field commanders in the Army upon the recommendation and from the personnel of the staff judge advocate—who had earlier recommended trial, and who will thereafter review the record of trial. Even in the relatively short time that the new system has been in operation, there have been fewer errors and less reversal by appellate agencies, and, of course, all possibility of command influence has now vanished.[1]

What this means, specifically, is that although Article 26(a) of the Uniform Code of Military Justice still states that "The authority convening a general court-martial shall appoint as law officer thereof an officer" with stated qualifications,[2] in fact the convening authority in the Army is now limited in making such appointments to the judicial officers named by The Judge Advocate General, who remain under the command of The Judge Advocate General.[3]

To understand the significance of this development, which will appear more than passing strange to every lawyer veteran of prior conflicts when other systems were in vogue, it is necessary to look backwards briefly.

The traditional system, from Continental Army beginnings through the end of World War I, made the members of a general court-martial judges of law and fact alike, with full power to rule by majority vote on all legal questions that arose in the course of the proceedings, including questions relating to the admissibility of evidence.[4] The only legal adviser to whom the court could turn for guidance was the judge advocate of the general court-martial, who was normally a layman—and who was moreover fully occupied with his primary duty of presenting the evidence for the prosecution.[5] Just to make his position a little more difficult, the judge advocate was also expected to safeguard the rights of the accused![6]

That system, however well it may have worked in a small professional army, broke down pretty badly in World War I,[7] and in 1920 Congress provided that for every general court-martial there should be appointed a specially qualified law member, whose particular duty it was to rule on interlocutory questions.[8] His rulings on the admissibility of evidence were final, those on other questions could be overruled by the court.[9] Apart from those

1. I am greatly indebted to Colonel Edward T. Johnson, Judge Advocate General's Corps, U. S. Army, now Chief of the Field Judiciary Division in the Office of The Judge Advocate General of the Army, for detailed information concerning the subject-matter of this article. Acknowledgements are also due to Colonel Walter T. Tsukamotu, J.A.G.C., U.S.A., Area Judicial Officer, I Judicial Area, and to Captain Mack K. Greenberg, U.S.N., Assistant Judge Advocate General of the Navy for Military Justice, for supplying supplemental data. All opinions expressed, however, are entirely my own.

2. 10 U.S.C. §826(a). All references to the United States Code herein are to the 1958 edition, except where otherwise specified. The statutory qualification for the law officer is that he must be "a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member".

3. Letter, AGAO-CC 210.31, subject: Law Officer Program, from The Adjutant General of the Army to commanders exercising general court martial jurisdiction.

4. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1896) *252, *432-434; MANUAL FOR COURTS-MARTIAL, 1917, ¶¶89, 90, 199; and see page 360. The MANUAL FOR COURTS-MARTIAL will hereafter be cited as "MCM", with its date, and Winthrop's still authoritative classic will be cited simply as "Winthrop".

5. Winthrop, *274-290; MCM, 1917, ¶¶95, 99.

6. Winthrop, *290-294; MCM, 1917, ¶96. From 1786 until 1916, the Articles of War provided that "The judge advocate . . . shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or to any question to the prisoner, the answer to which might tend to criminate himself . . ." Article of War (hereafter "AW") 6 of 1786; AW 69 of 1806, and AW 90 of 1874. Winthrop, *1505, *1517-1518, *1533.

7. See *Trials by Court-Martial*, Hearings Sen. Comm. Military Affairs on S. 5320, 65th Cong., 2d sess.; *Establishment of Military Justice*, Hearings Sen. Comm. Military Affairs on S. 64, 66th Cong., 1st sess.

8. AW 8 and AW 31 of 1920, 10 U.S.C. (1926 through 1946 eds.) §§1479, 1502.

9. AW 31 of 1920, 10 U.S.C. (1926 through 1946 eds.) §1502. The third proviso to AW 31 spelled out with great particularity just what questions were not to be included within the expression, "objection to the admissibility of evidence offered during the trial".

additional duties, he deliberated and voted in closed session just like any other member.[10] The law member innovation was based on the British experience in World War I with the "specially qualified member".[11]

World War I Lessons Forgotten in Peacetime

But, in the years between the wars, actual practice lapsed back to what had been usual in the past. Article of War 8 of 1920 provided that the law member "shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member".[12] But the number of judge advocates was in fact so limited[13] that line officers were normally appointed to serve as law member. Nor was there any requirement that the law member be actually present at the trial just so long as he was duly named in the appointing order.[14] Actually the system worked fairly well, because of the generally high level of training in the peacetime army, plus the fact that the untrained had plenty of time to acquire proficiency. The two old chestnuts—"What the policeman said is not evidence", and "You can't prove desertion by the morning report"—adequately taught—and enforced—the substance of the hearsay rule.

With World War II, lawyers were, as the phrase went, a dime a dozen—but their professional training was not utilized, and the old law member practices continued.

The lessons of the World War I difficulties had been forgotten. No effort was made to supply legally trained law members, or to supply a modicum of training for lay law members. There was, everywhere, a shortage of legally trained officers available for such duty—and, curiously enough, some of the laymen detailed as law members did rather better than the lawyers.[15] The legality of detailing a layman as law member even when judge advocate officers were present was duly sustained by the Supreme Court in *Hiatt* v. *Brown*.[16] But undoubtedly it was a mistake, an inexcusably short-sighted mistake, for the Army not to have supplied lawyer law members and not to have insisted that lawyer law members be used.

It took an Act of Congress to supply the necessary corrective, *viz.*, the 1948 amendment to Article of War 8 that required the law member to be a lawyer and that also required him to be present throughout the trial.[17]

The ink was hardly dry on the 1948 Amendments, however, before the draft of the Uniform Code of Military Justice was presented for enactment.[18] And that draft provided, not a law member after the 1948 Army and Air Force pattern,[19] but a law officer who was no longer a member of the general court-martial, who simply made rulings, but who did not retire with the members and who accordingly did not vote on the findings or sentence.[20]

Strangely enough, the law officer concept was sponsored by the Navy, which had never adopted the law member concept, even in its tenuous 1920-1948 Army form; and, when the drafting committee split on that issue, Secretary of Defense Forrestal—whose earlier associations with the Armed Forces had been as Under Secretary and then as Secretary of the Navy—decided in favor of the Navy's law officer concept.[21]

The Uniform Code went into effect on May 31, 1951, and since then its provisions have been interpreted by the Court of Military Appeals, whose determinations, other than on jurisdictional issues, are not reviewable in the civil courts.[22] Over the years, the Court of Military Appeals has endeavored "to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system".[23]

Thus, the law officer gives instructions, not simply on the elements of the offense as required by the Code,[24] but on all issues raised, and his instructions to the court-martial are tested by the same standards as a federal judge's instructions to a jury.[25]

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10. MCM, 1921, ¶89a(6); MCM, 1928, ¶40.

11. See Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War*, 12 J. CRIM. L. 84 (1921). This point had been elaborated by Colonel Rigby in complete detail during the hearings on S. 64 in 1919, *supra* note 7.

12. AW 8 of 1920, 10 U.S.C. (1926 to 1946 eds.) §1479.

13. Between fiscal year 1923, following the 1922 reduction, through fiscal year 1940, just prior to the World War II mobilization, the number of Judge Advocate officers on duty ranged from a low of 82 to a high of 95, and averaged just under 90. These figures, drawn from the Annual Reports of the Secretary of War for the years in question, were very kindly supplied by First Lieutenant Richard P. Nee of the Office of The Judge Advocate General of the Army.

14. *Digest of Opinions of The Judge Advocate General of the Army, 1912-1940*, ¶¶365(9) and (10); MCM, 1928, ¶38c.

15. If I may be permitted to quote from an earlier paper—"... many many able counsellors do not know enough about trials and the law of evidence to function satisfactorily [as law members]. My own answer to the question whether the system can operate without lawyers cannot be put in terms of yes or no, largely because I found that putting a lawyer into the key jobs was no guarantee that trials would go off without a hitch. I knew one Coast Artillery Corps colonel with nearly thirty years' service who did a fine conscientious job as law member, with a minimum of sour rulings. On the other hand, two of the worst miscarriages of justice in my experience were occasioned by flagrant mistakes of lawyer law members. One was a practicing lawyer commissioned in the Infantry, the other was a member of the JAGD." Wiener, *The Court-Martial System*, 60 INFANTRY JOURNAL 31, 33 (January, 1947).

16. 339 U. S. 103. *Accord*, *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), certiorari denied *sub nom. Henry* v. *Smith*, 336 U. S. 968.

17. AW 8 of 1948, 10 U.S.C. (Supp. II to 1946 ed.) §1479.

18. See S. 857 and H.R. 2498, 81st Cong., 1st sess., both introduced on February 8, 1949.

19. The Act of June 25, 1948, c. 648, 62 Stat. 1014, made the Army Articles of War applicable to the then (September, 1947) newly created Air Force.

20. See draft article 26 in the bills cited *supra* note 18.

21. *Uniform Code of Military Justice*, Hearings H.R. Comm. Armed Services on H.R. 2498, 81st Cong., 1st sess., 1152-1153; *Uniform Code of Military Justice*, Hearings Sen. Comm. Armed Services on S. 857 and H.R. 4080, 80th Cong., 1st sess., 308; 96 Cong. Rec. 1355, 1359-1362.

22. For instances where the Court of Military Appeals sustained the military jurisdiction, but the civil courts later held that the accused were not subject to such jurisdiction, compare *United States* v. *Smith*, 5 USCMA 314, 17 CMR 314, and *United States* v. *Covert*, 6 USCMA 48, 19 CMR 174 (jurisdiction sustained), with *Reid* v. *Covert*, 354 U. S. 1 (jurisdiction denied as to both); *United States* v. *Dial*, 9 USCMA 541, 26 CMR 321 (jurisdiction sustained), with *Kinsella* v. *Singleton*, 361 U. S. 234 (jurisdiction denied); *United States* v. *Wilson*, 9 USCMA 60, 25 CMR 322 (jurisdiction sustained), with *McElroy* v. *Guagliardo* (and *Wilson* v. *Bohlender*), 361 U. S. 281 (jurisdiction denied); and *United States* v. *Grisham*, 4 USCMA 694, 16 CMR 268 (jurisdiction sustained), with *Grisham* v. *Hagan*, 361 U. S. 278 (jurisdiction denied).

Rulings of the Court of Military Appeals are not reviewable by the civil courts on the view that the former is simply an administrative agency. *Shaw* v. *United States*, 209 F. 2d 811 (D. C. Cir.).

23. *United States* v. *Biesak*, 3 USCMA 714, 722, 14 CMR 132, 140. Cf. *United States* v. *Keith*, 1 USCMA 493, 496, 4 CMR 85, 88.

24. Art. 51(c), UCMJ, 10 U.S.C. §851(c). Cf. Sen. Rep. 486, 81st Cong., 1st sess., page 23.

25. The first case holding that, notwithstanding anything in par. 73c, MCM, 1951, the law officer was obliged to give additional instructions, was *United States* v. *Clark*, 1 USCMA 201, 2 CMR 107. For an early case reversed because of refusal to give a proper instruction as to character evidence, see *United States* v. *Phillips*, 3 USCMA 137, 11 CMR 137. Cases since then that turned on instructions are too numerous to cite.

The president of the general court-martial may not usurp the law officer's functions,[26] nor may the law officer exceed his own powers by entering the closed session of the court.[27] The law officer must be scrupulously impartial[28] and must avoid all out-of-court discussions with the members.[29] Finally, he has power to declare a mistrial.[30] And, concomitantly with these functions of the law officer, which have increasingly transformed him into a civilian judge, the members of the general court-martial have correspondingly become essentially jurors, and so may no longer avail themselves of the privilege of taking the *Manual for Courts-Martial* into closed session.[31] They now must take all of their law from the law officer; there is no more room for individual interpretation.

Who Made a Judge Out of the Law Officer?

It need hardly be added that the sum total of these changes has not brought complete happiness to all uniformed lawyers. A recent careful study, which asked, "Who Made the Law Officer a 'Federal Judge'?,"[32] concluded as follows:

> During the debates on the Uniform Code, opponents of Article 26[33] complained that comparisons between the law officer and a civilian judge were misleading since the former was not in truth given the powers of the latter. The Court of Military Appeals has gone a long way toward eliminating the basis for this objection. If Congress failed to create a law officer in the image of a Federal judge, the Court is determined to succeed.[34]

And, it must be pointed out in all fairness, the Court very purposely set that path for itself.[35]

But service lawyers were not in all respects equipped to discharge the law officer's functions as those functions have been delineated since the effective date of the Uniform Code. Manuals for law officers containing samples of approved instructions[36] helped, but did not reach the heart of the problem, as indeed the number of reversals for law officers' trial errors all too clearly indicated. Two basic difficulties remained.

First, the law officer was detailed to sit with particular courts, or for particular cases. He had other duties in the office to which he was assigned, which was, in most instances, that of the staff judge advocate of the command. Frequently, of course, the law officer was made available from a neighboring command—where he was himself the staff judge advocate with a multitude of other duties. In neither instance was the law officer devoting all of his time to the business of being, in truth and in fact, a judge.

Second, the law officer in the more usual situation was only theoretically a free agent. Under the Uniform Code, just as under the Articles of War, it was the staff judge advocate—the convening authority's legal adviser—who recommended trial in every instance;[37] and it was similarly the staff judge advocate who reviewed the record of trial and advised the convening authority of the legal sufficiency of the proceedings.[38] Consequently, when the law officer detailed to preside over the trial was a subordinate in the staff judge advocate's office, as indeed he was in most instances, it could hardly be expected that he would be unaware that he was dealing as law officer with a set of charges whose sufficiency had already been passed on by the very officer who would in due course make out the same law officer's efficiency reports.

Here, inescapably, was command influence in its most sinister—and in its most usual—aspect. For, notwithstanding the common assumption of the uninformed that "command influence" means a general officer thumping his desk and shouting at some cowed lawyer in uniform, it is the fact that command influence in the administration of military law almost invariably emanated from the office of the staff judge advocate. Civilian lawyers do not know this; all military lawyers are fully aware of this fact, which long remained a "messy area" in the administration of military justice.[39]

Both factors—the part-time character of the law officer's work, plus the fact that he was more frequently than not under the shadow of the staff judge advocate—contributed to the incidence of error requiring ultimate correction

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26. *United States* v. *Berry*, 1 USCMA 235, 2 CMR 141.

27. *United States* v. *Keith*, 1 USCMA 493, 4 CMR 85; cf. *United States* v. *Mortensen*, 8 USC MA 233, 24 CMR 43.

28. *United States* v. *Jackson*, 3 USCMA 646, 14 CMR 64; cf. *United States* v. *Renton*, 8 USCMA 697, 25 CMR 201.

29. *United States* v. *Walters*, 4 USCMA 617, 16 CMR 191. Compare, for a particularly flagrant instance of out-of-court discussion of a pending case, *United States* v. *Kennedy*, 8 USCMA 251, 24 CMR 61.

30. *United States* v. *Stringer*, 5 USCMA 122, 17 CMA 122. Cf. *United States* v. *Jones*, 7 USC MA 283, 22 CMR 73, sustaining power of law officer to challenge a member of the court.

31. *United States* v. *Rinehart*, 8 USCMA 402, 24 CMR 212.

32. By Major Robert E. Miller, Judge Advocate General's Corps, U. S. Army, appearing in *Military Law Review* (Department of the Army Pamphlet 27-100-4, April, 1959), page 39.

33. *Supra*, note 2.

34 *Op. cit. supra*, note 32, page 77.

35. *Id.* at page 66, citing Latimer, *Improvements in the Administration of Military Justice*, 1953 Army Judge Advocates Conference 21, 24-27. George W. Latimer has been a Judge of the Court of Military Appeals since its creation in 1951.

36. See Department of the Army Pamphlet No. 27-9, *The Law Officer*. This document was first published in December, 1952, and was followed by revised editions in August, 1954, and April, 1958.

37. Art. 34, UCMJ, 10 U.S.C. §834; par. 35*b* and *c*, MCM, 1951.

38. Art. §1, UCMJ, 10 U.S.C. §861; par. 85, MCM, 1951.

39. See *Messy Areas in the Administration of Military Justice*, 21 THE JUDGE ADVOCATE JOURNAL (December, 1955) 20, 23-24.

by the Court of Military Appeals. And both factors are eliminated by the Army's Field Judiciary System, with a consequent drop in the percentage of reversals for law officer errors.

The essence of the Field Judiciary System is twofold. First is the creation of a corps of permanently assigned judicial officers, who perform full-time duty as law officers and who are under the command of The Judge Advocate General—and of no one else. Second, none but a permanently assigned judicial officer may be detailed as law officer of any Army general court-martial.

This system, first inaugurated on a pilot basis early in 1958 in Europe and in the Sixth Army area in the United States (which includes, roughly, the states west of the Rockies), proved so successful that late in the same year it was authorized on a world wide basis, and, since November, 1959, it has been completely activated.

How the System Operates

Regions where the Army is stationed throughout the world are divided into eight Judicial Areas. These Judicial Areas correspond roughly with existing Army Areas—six in the Continental United States, the Seventh Army in Europe, the Eighth Army in the Far East—but not exactly. Thus, while the U. S. Army Antilles in Puerto Rico is subordinate to the U. S. Army Caribbean in Panama, Puerto Rico is in the I Judicial Area while the Canal Zone is in the IV Judicial Area. Similarly, the VI Judicial Area includes both Alaska and Hawaii, although the U. S. Army Alaska is not under or a part of Sixth Army, and although Hawaii is the seat of Headquarters U. S. Army Pacific, which commands the troops in Japan and Korea. This arrangement was based primarily upon case loads and travel factors. The resultant divergence between Judicial Areas and Army Areas serves however incidentally to emphasize the fact that judicial officers are neither a part of the particular Army staff, nor under the command of or subordinate to the Army Commander.

All but one of the eight Judicial Areas is divided into Judicial Circuits, the sole exception being Area I and the 1st Circuit, located in Washington. This identity is occasioned by the pinch-hitting mission assigned to the Washington office, which is called on to supply judicial officers when none is available in the field. All told, there are nineteen Judicial Circuits, with generally two or more circuits in a Judicial Area, and, as in Europe, as many as five.

The nineteen circuits are staffed by thirty judicial officers. The senior in each circuit is the Circuit Judicial Officer, who may also be the senior in each area and thus the Area Judicial Officer. Administrative supervision is provided by a single officer, the Chief, Field Judiciary Division, in the Office of The Judge Advocate General.

The system operates as follows:[40] Each judicial officer has a duty station, which is selected in the light of the case load of trials by general court-martial. When a general court-martial is appointed, the convening authority must appoint as law officer a judicial officer of the judicial circuit wherein the trial is to be held. In the event that the judicial officer normally to be assigned is unavailable for any reason, such as illness or leave, then the convening authority must detail as law officer another judicial officer designated by the Circuit Judicial Officer, or—in unusual circumstances—by a judicial officer expressly designated by The Judge Advocate General of the Army. As stated in an official letter to all commanders,

> convening authorities will thereafter appoint as law officer only a judicial officer or such other officer as may be expressly designated for that duty by The Judge Advocate General. Except for this administrative limitation upon who shall be eligible for appointment as law officer the program will in no way affect the powers, duties, and prerogatives of the convening authorities relating to the administration of military justice, disturb the relationship between convening authorities and their staff judge advocates, nor alter in any manner the duties or operations of staff judge advocates.[41]

The mechanics of effecting the appointment of law officers under the foregoing directive are very simple. Prior to the trial of each case by general court-martial, and as early as practicable, the convening authority or his representative contacts the Circuit Judicial Officer and informs him of (a) the nature of the charge; (b) the estimated duration of the trial; and (c) the proposed date and place of the trial. Based on this information, and dependent upon work load and availability, the Circuit Judicial Officer will confirm the date of trial, and notify the convening authority of the name of the judicial officer (or officers) who will be available to act as law officer. Every effort is made to set pending cases for trial on the same or on succeeding days.[42]

While endeavoring at all times to comply with the administrative desires of the convening authority's headquarters, the ultimate decision as to the time of trial necessarily rests with the Circuit Judicial Officer.

Upon appointment, the law officer is furnished with a copy of the appointing order, with a copy of the charges, and with information as to the date of the trial and its estimated length. He receives no other information. Thereafter whatever further arrangements seem necessary are made locally.

So much for the bare bones of administration; now, what has been the result of trials supervised by full-time judicial officers?

First, there is far more emphasis on the actual trial than there was, with the consequence that the average trial time—the actual length of the trial—has about doubled since 1957. This reflects more attention paid to interlocutory rulings and to instructions; the law officer who has the status of a judicial officer will not be rushed. This is in sharp contrast to the usual situation earlier, when a law officer from the particular post would be subject to the pressure of the president of the court—normally a rather senior officer—to "get on with it".

Second, the incidence of law officer error is far smaller. In 1957, some

40. The information that follows is drawn from "Standing Operating Procedure", a memorandum of the Field Judiciary Division, Office of The Judge Advocate General, dated January 1, 1959.
41. *Cited supra*, note 3.
42. *Supra*, note 40.

2½ per cent of all trials by general court-martial were reversed for law officer error. In the first eighteen months since the program became operational, that percentage had dropped to 1.1 per cent.

What about service acceptance of the new concept?

System Finds Favor Among Commanders

Commanders, for the most part, favor the plan, because they judge by results: The new system involves fewer reversals, *i.e.*, less "court-martial trouble"; hence, it is a better system. Only a very few major commanders currently express a preference for a program more nearly centralized under their own control, and those few probably express the views of their staff judge advocates. Because, very plainly, any legal program controlled by a particular headquarters will in actual fact be controlled by that headquarters' staff judge advocate. But these preferences are essentially mental reservations. The Secretary of the Army has ordered the program, and The Judge Advocate General has made it plain to the members of his own Corps that he desires the program to succeed. In actual practice, there is full co-operation at all levels.

Significantly enough, the Field Judiciary System is liked by court members. A senior judge advocate, who was a judicial officer during the pilot phases of the program, recently wrote:

> ... when the court initially convened, the court members would take their position at the bench and then the bailiff would inform me that counsel, the accused, and the court members were in readiness to proceed with the trial, at which time I would enter the court room and assume my position at the law officer's bench. It was interesting to note, in this connection, that the court members, counsel, and the accused, automatically arose as I entered the court room and proceeded to my bench...

This mark of respect, instinctively tendered, speaks more eloquently for service acceptance of the Judicial Officer concept than reams of correspondence possibly could do.

Administrative supervision of judicial officers is minimal, and does not interfere in any degree, even indirectly, with their complete independence.

Judicial officers are selected from among all the senior officers (Colonel and Lieutenant Colonel) of the Judge Advocate General's Corps at large who are deemed best qualified by reason of maturity, temperament, training and experience to perform judicial functions. All potential judicial officers are asked whether they want such an assignment, and there is an open offer to all senior judge advocate officers to request detail as judicial officer; The Judge Advocate General of the Army makes the actual selection on nomination by the Chief, Field Judiciary Division.

Detail as judicial officer is normally for a three-year tour, subject to transfer at the request of the officer concerned if and as other professional opportunities appear. The question of reappointment has of course not yet arisen, nor have any judicial officers' appointments been terminated involuntarily. The only basis for such termination would be a demonstrated temperamental unsuitability for judicial functions.

Judicial officers are controlled in the exercise of their functions only in respect of procedural rulings, not at all on any other matter. Thus, after the Court of Military Appeals had held in the *Cruz* case[43] that it was error, following a plea of guilty, not to require explicit findings of guilty by the court-martial, there having been prior rulings by judicial officers both ways, The Judge Advocate General issued a circular advising every judicial officer that henceforth the *Cruz* procedure was to be followed.

No other directions are given by The Judge Advocate General, and none can be given by others; judicial officers are not under any other command. They are supplied by airmail with every Court of Military Appeals and Board of Review decision on the date of promulgation. For self-study, they receive an outline of the Law Officer course of The Judge Advocate General's School, a three-week training period that all judicial officers normally undergo.

Efficiency reports on judicial officers are rendered by the Area Judicial Officer as rating officer and by the Assistant Judge Advocate General as indorsing officer. Area Judicial Officers are rated by the Assistant Judge Advocate General and have their reports indorsed by The Judge Advocate General. Thus, very plainly, judicial officers are not subject to such thinly veiled command control as the president of the Navy general court-martial exercised over the other members of the court, control which was exposed and disapproved in the *Deain* case.[44]

Staff visits are kept to a minimum. The Chief Field Judiciary Division, visits every general court-martial jurisdiction once a year, now about ninety in number. He calls on the commander and the staff judge advocate at their headquarters, and then visits all judicial officers, wherever located. These visits are designed to ascertain whether the system is functioning, and, primarily, whether all concerned are satisfied with arrangements. Up to now, as has been indicated, acceptance has been general. It is of course too early to prophesy concerning the future impact of this system. It may be ventured, however, that when the presidentially prescribed *Manual for Courts-Martial* is next revised,[45] it will reflect the increased stature given the law officer by the Court of Military Appeals decisions that have already been mentioned. Thus, it is entirely likely that the present functions of the president of the general court-martial[46] will be sharply curtailed, to the point where he will be little more than the foreman of a jury. In all probability, the law officer, who now sits at the side,[47] will sit at the front on a raised dais, thus making the military courtroom resemble in every respect the civilian. And, in due course, it may be anticipated that, just as the military chaplain wears a scarf or stole even when he is not otherwise attired in ecclesiastical vestments,[48] so the law officer will wear a

43. *United States* v. *Cruz*, 10 USCMA 458, 28 CMR 24.
44. *United States* v. *Deain*, 5 USCMA 44, 17 CMR 44.
45. The present MANUAL was promulgated by Executive Order No. 10214, February 8, 1951, 16 Fed. Reg. 1303, pursuant to Art. 36, UCMJ, 10 U.S.C. §836.
46. Par. 40*b*(1), MCM, 1951.
47. See chart at page 500, MCM, 1951.
48. Field Manual 16-5, *The Chaplain* (April 15, 1958), ¶30; Army Regulations 670-5, *Uniform and Insignia—Male Personnel*, September 28, 1959, par. 120*a*.

similar article of uniform while he is in the execution of his office.

Finally, the successful operation of the Army's Field Judiciary system is, in one way or another, certain to cause its adoption by the other services.

Up to the time that the present article was written, early in 1960, neither the Navy nor the Air Force had followed the Army's example. Since then, however, there have been two significant developments.

First, the Court of Military Appeals has formally recommended, in its report covering the calendar year 1959, that the Army's Field Judiciary program "should be established by law in each of the other services".[49]

Second, the Secretary of the Navy in August, 1960, determined to establish a Navy law officer program, on a pilot basis, in the Third, Fourth, and Fifth Naval Districts, the Potomac River Naval Command, the Fleet Commands based therein, and in the Marine Corps School Command. This covers a large proportion of the Navy's installations on the Atlantic Coast.[50]

It is, therefore, most unlikely that the Air Force will for too long put off the obvious step of providing a full-time and fully independent judiciary to staff trials by general court-martial under the Uniform Code of Military Justice. Congress is committed to the essential concepts of that Code, and Congress doubtless will recognize that the Code will not work well when rulings are entrusted to part-time law officers operating under the "brooding omnipresence"[51] of command. Consequently it seems safe to predict that, if necessary, acceptance of the Army's Field Judiciary system on an all-service basis will be forced by congressional mandate.

49. Annual Report of the United States Court of Military Appeals, 1959, page 35.

50. Memorandum, Assistant Secretary of the Navy to Chief of Naval Operations, Chief of Naval Personnel, and Judge Advocate General, *Navy-Wide Law Officer Program*, September 21, 1960.

51. Holmes, J., in *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, 218, 222.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1961 Annual Meeting and ending at the adjournment of the 1964 Annual Meeting:

Arkansas	Louisiana	New York
Colorado	Maryland	Ohio
Delaware	Minnesota	Oregon
Georgia	Nevada	Rhode Island
Idaho	New Hampshire	Utah
Indiana		West Virginia

State Delegates will be elected in Tennessee and Vermont, each to fill the vacancy in the term ending at the adjournment of the 1962 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1961 must be filed with the Board of Elections not later than March 10, 1961. Petitions received too late for publication in the March issue of the *Journal* (deadline for receipt February 1) cannot be published prior to distribution of ballots, which will take place on or about March 20, 1961.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 10, 1961.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held not later than fifteen days after the time for filing nominating petitions expires.

Board of Elections
John R. Dethmers, Chairman
Harold L. Reeve
Robert B. Troutman

A General Education for Pre-Law Students

The author argues that a general education is a better preparation for study of the law than either the customary political science or business major. A broad understanding of the humanities, he says, is the best way of developing the imagination and insight that lawyers need for their role in society.

by James L. Kelley

No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mystery of the universe, and forget all about your future career.

—Felix Frankfurter, *Of Law and Men.*

THERE ARE TWO typical undergraduate avenues leading to the professional study of law: political science and a commercial or business major. The relevance of these approaches to legal study is immediately apparent. A good many lawyers, perhaps the majority, are more or less actively engaged in business activities, and the most direct route to an active political life still passes through law school. However, there are other areas of study having equally valid claims on the attention of the prospective lawyer. This fact is reflected in Justice Frankfurter's statements and insofar as his statements do not endorse current practice, they should be scrutinized closely by students and educators. How can the humanistic disciplines contribute to the development of competent lawyers? This paper will attempt to analyze this question and to suggest a few of the answers.

Although general knowledge of the structures of state and national governments and the subtleties of double-entry bookkeeping are undoubtedly important to every lawyer and crucial to some, the prospective law student should devote a generous portion of his time to the study of his cultural heritage; he should attempt at least a nodding acquaintance with modern science; he should become acutely aware of the distinctions between statements of fact and value; he should know when the line has been crossed between the discussion of an idea and the propagation of an ideology. Since he is preparing himself for a profession which is intellectual in character, he should examine his options and make his own commitments as to intellectual and moral matters. He should consider whether he believes in the fixity or relativity of moral precepts; whether he is a Christian and, if so, what kind, or whether he prefers to file a dissenting opinion. The Golden Rule is not enough. He must learn how to answer George Bernard Shaw, who rephrased the Golden Rule in the following terms: "Do not do unto others as you would that they should do unto you. Their tastes may not be the same. Do not love your neighbor as yourself. If you are on good terms with yourself, it is an impertinence, if on bad, an injury. The Golden Rule is that there are no Golden Rules." Most important of all, the pre-law student must learn the value of an open mind. No one has said the last word, and it is unlikely that such a signal honor will fall to a fledgling lawyer.

Rational and Consistent Patterns of Thought

Pre-legal education should equip the prospective lawyer with rational and consistent patterns of thought. Good law is not good law because it was formulated by Blackstone, Marshall, or even the Warren Supreme Court. It is good law because its benefits outweigh its disadvantages. Starting with this basic premise, the legal analyst must proceed to the more difficult questions. Benefits and disadvantages to whom? "The People" is a fiction and, if the lawyer takes it seriously, not a very amiable one. There are farmers, insurance companies, bankers, doctors, lawyers and merchant chiefs representing conflicting interests. Since the repercussions of court decisions and legislative enactments are felt at every level of society, judges, lawyers and legislators must be capable of extremely subtle distinctions in their analyses of legal problems which are so frequently arrayed in slightly differentiated shades of gray. The lawyer must learn to be wary of the facile explana-

tion, the pat answer.

To take a concrete example, the deterrent theory is frequently advanced in justification of the criminal law. At first glance, the deterrent theory seems to make good sense. But Bertrand Russell has pointed out that if this is the only purpose of criminal law, its ends would be perfectly served if criminals were publicly tried and publicly conveyed through the front gates of prisons, then secreted out the back way and sent to a desert island paradise. Is the deterrent theory inadequate, or is Lord Russell merely being unkind? The lawyer must persist in clarifying his terms and re-examining his premises, ever striving for lucid, unbiased thought. Since total objectivity is a myth, he would do well to admit frankly his prejudices at the start. Lawyers spend a disproportionate amount of time in mutual congratulation and not enough time in intelligent self-criticism. In this connection, the prayer of John Stuart Mill is especially relevant:

> Lord, enlighten thou our enemies . . . sharpen their wits, give acuteness to their perceptions and consecutiveness to their reasoning powers. We are in danger from their folly, not their wisdom; their weakness is what fills us with apprehension, not their strength.

The ability to see things in perspective; linguistic skill and intellectual sophistication; rational patterns of thought and the habit of self-criticism —these are certainly lawyer-like virtues. Let us proceed to examine the connections between a pre-legal education focused on ideological-cultural matters and the development of these characteristics in the prospective law student. The study of philosophy is a good starting point; first because of all the humanistic disciplines it is the most abstruse, and second because it is quite widely considered, even by some philosophers, as largely a waste of time.

Questions, Not Answers, Are Important

Almost any university philosophy faculty belies the stereotype of the bearded, stoop-shouldered sage; philosophers simply do not look or act as they are supposed to. But one thing can be said of philosophers generally with a degree of confidence: they do not agree with each other. Assuming that there is a small, yet-to-be published volume called *Truth*, it follows that much that has been produced in the rubric of metaphysical speculation is the sheerest hokum. But it is often said that philosophy is not so important for the bewildering welter of contradictory answers it offers, as for the kinds of questions it asks: What is reality? What is truth? Is there such a thing as truth? What can we know? Can we really know anything? Lawyers often ask the same kinds of questions in the field of jurisprudence. The answers range from the theological school, which would see God's will figured forth in the state liquor laws, to the functional school, which adheres to the empirical approach and comes up with some equally astonishing conclusions. It was a functionalist who observed that if No Parking signs are erected on a busy street, people are likely not to park there. There is certainly a good deal of implicit jurisprudence involved in the everyday practice of law. Every time a judgment is paid or a criminal sentenced, it represents the enforcement of a social standard of values. It seems scarcely more than a truism to say that the lawyers, those who supervise and shape their society's notions of justice, should themselves have a rather clearly defined notion of what they are doing and why.

Moreover, might there not be such a thing as getting in condition for arduous intellectual work, a sort of one-to-one correspondence between physical and intellectual development? If the pre-law student spends a few hours slogging persistently through the ponderous prose of Kant's *Critique of Judgment*, might he not make his way through *Palsgraf* v. *Long Island RR.* with relative ease? If he has a degree of familiarity with David Hume's analysis of causation, might he not the more readily recognize the law of proximate cause for the terrible mess that it is? The lawyer, ostensibly the champion of reason and the open mind, must be prepared to deal with ideas on a high level of sophistication. He must not fall prey to those who traffic in patriotic, if rather hackneyed, phrases;

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otherwise, he may find himself playing the fool at the behest of the first fast talker to come down the pike.

Proceeding on the hazardous assumption that some sort of a case has been made for the study of ideas themselves, let us consider other humanistic studies. In a book called *Science and the Common Understanding*, J. Robert Oppenheimer makes the following statements:

> It is inherent in the very notion of culture and of tradition that there is a cumulative aspect to human life. The past underlies the present, qualifies and moderates it, and in some ways limits it, and in some ways enriches it. We understand Shakespeare better for having read Chaucer, and Milton for having read Shakespeare. We appreciate Trevelyan more for having read Thucydides. We see Cezanne with better eyes for having looked at Vermeer, and understand much more in Locke for knowing Aristotle, St. Matthew for knowing Job.

Mr. Oppenheimer is a case in point for the argument of this paper. Just as philosophy, literature and history may not be generally regarded as stepping stones to the law, so the same disciplines are not usually associated with success in the physical sciences. In less turbulent times, this may not have been the case; in the present time, however, it seems not only possible but probable

that if Robert Oppenheimer had had a higher degree of philosophical and political awareness in the thirties, he might not have lost his security clearance in the fifties. Moreover, if there had been more intelligence and responsibility operative in politics in recent years, as opposed to witch hunting, Mr. Oppenheimer might have been excused for his earlier naïveté.

Words Are the Business of Lawyers and Poets

Lawyers and poets have a major interest in common—words are their business. Formal training in literature would go far in substantiating the presumption of literacy which operates in favor of every beginning law student. Literature is also an excellent training ground in analogical reasoning and the making of subtle distinctions. Moreover, it is impossible to live very long with good writing without improving one's own style. The student will at least realize how bad his style is, and that is a start. It can be safely assumed that Benjamin Cardozo did not spend all of his leisure time absorbing the felicitous phraseology of the New York Reports.

Few lawyers would quarrel with the relevance of historical studies to the study of law. The staggering complexity of historical problems provides an excellent obstacle course for developing the intellectual capabilities of the prospective law student. He will discover that historians have abandoned the attempt at a scientific, comprehensive description of the human adventure in civilization. Documentation is no longer the end, but has become the groundwork for analysis and interpretation. Through historical studies, the pre-law student can most fully appreciate the organic development of modern legal systems. He may conclude that Napoleon's code was more important than his conquests. Legal rights which are often considered self-evident and taken for granted did not develop *in vacuo*. Individual freedom and the due process of law are relatively new ideas in historical perspective—slavery has a much more impressive pedigree.

The impact of scientific inquiry and consequent technological development has been so great and far reaching that the lawyer is ill prepared for his task if he emerges from his pre-legal training with a complete lack of sophistication as to scientific developments. It is doubtful whether any court or client will ask him for a detailed explanation of Einstein's theories of relativity, but he should be aware of the fact that such everyday notions as time, space, and causation have been subjected to searching analyses by modern physicists and mathematicians, and that their conclusions, though tentative, are surprising and perhaps a little bit disturbing.

Shifting Mental Gears

One of the most important facets of legal analysis is the process of relating legal concepts and theories to differing sets of factual situations. For example, freshman students of property law first become acquainted with the legal concept of possession in the case of *Pierson* v. *Post*. At first reading, it is difficult to tell who won—Pierson, Post or the fox. Having gained a grasp of the law of animals *ferae naturae*, the neophyte suddenly finds the factual situation radically changed. The principles which governed the disposition of the wily fox are successfully urged in a dispute over the ownership of the natural gas. The student must learn how to shift his mental gears rapidly and smoothly.

In pre-legal education, interdisciplinary humanities courses offer a bright and interested student the chance to develop his speed-shifting technique. Humanities courses are now quite widely offered, sometimes under the heading of "Great Books courses". Though the programs vary in different universities, their goals are generalized and highly similar. Seminar-type courses are devoted to the reading and discussion of significant works in such diverse fields as philosophy, literature, history, the fine arts, and the natural and social sciences. Individual courses focus on specific interrelated problems. For example, at the State University of Iowa, such courses as "Science and the Nature of Man", "Values in the Contemporary World", and "Cultural Ideals of East and West" are offered.

Interdisciplinary study would be of particular value to the prospective lawyer. Such study develops an awareness of contrast, an appreciation of the unique situation which demands imaginative treatment. "The Commonwealth of the Arts" is an alluring, but in the last analysis, deceptive phrase. Unity through the process of reduction may be a realizable goal in the natural sciences; theoretical integration has in fact been achieved in the heretofore separate pursuits of chemistry and physics. But artistic and literary idioms are only superficially similar. Metaphor is the property of the poet; the beauty of line belongs to the painter, the sculptor and the architect. It may well be that the first four notes of Beethoven's Fifth Symphony signify Fate knocking at the door, but it might as easily be the bill collector. The significant fact is that all the arts and sciences have unique and relevant comments to make with respect to fundamental problems. Attempts to reduce them to some sort of specious unity only succeed in impoverishing and falsifying the richness to be found in diversity and paradox.

It is the goal of humanistic study to develop in the student a lively sense of contrast and paradox. Just as the various humanistic disciplines are significantly discrete and even contradictory, so the law is not all of a piece. Correspondingly, there is no "Commonwealth of the Law", no set of handy lowest common denominators to which all legal problems can be reduced. Superficially similar problems often require radically different rationales. Through interdisciplinary study, the pre-law student could develop discrimination in comparative approaches and a taste for complexity.

The thesis of this paper, first stated in the quotation from Justice Frankfurter, might best be illustrated and restated by quoting from C. D. Darlington's lecture "The Conflict of Science and Society".

> It is no accident that bacteria were first understood by a canal engineer, that oxygen was first isolated by a Unitarian minister, that the theory of infection was established by a chemist, the theory of heredity by a monastic schoolteacher, and the theory of evolution by a man who was unfitted to be a university instructor in either botany

or zoology... We need a Ministry of Disturbance, a regulated source of annoyance; a destroyer of routine; an underminer of complacency.

A legal system is no better or worse than the men who administer and develop it. If the law is to remain vital and growing, the lawyers must be men of imagination and insight. It follows that the years of pre-legal education, when intellectual interests and disciplined habits of thought might first be developed, are crucial. The prospective law student who devotes himself to the sustained study of intellectual matters will gain a sharpened critical faculty and a high degree of rational control in the selection of his options and the making of his commitments. He can achieve that quality of cultivation which Justice Frankfurter considers the hallmark of the competent lawyer.

An Extraordinary Trial Before the Moroccan High Court

The following account was sent to the *Journal* by M. Georges Khiat, a lawyer at the Bar of Casablanca since 1935.

A foodstuff fraud of adulterated oil which led to the paralysis of 10,000 persons

The 16th of September, 1959, while His Majesty, the King of Morocco, was in Meknes, an unprecedented epidemic of an exceptional character broke out in this town which gave rise to thousands of victims.

Women, men, children were suddenly attacked by paralysis of the limbs. The hospitals were crowded out with victims. At the request of Moroccan sovereign aid began to flow in from many parts of the world.

A rapid investigation revealed that the trouble arose from foodstuff poisoning and that all the victims had absorbed a mixture of household oil and an oil which served for the cleaning of airplane turbo-reactors. This mixture was extremely harmful and contained especially phenol.

The police proceeded to numerous arrestations and quickly it was discovered that these wicked traders had bought at the American air base at Nouaceur surplus rinsing oil for aircraft engines which was mixed with olive oil. Following these events the Moroccan population were extremely angry and the authorities promulgated a special "dahir" to check these acts. The text of the law not only contained the pain of death but also a measure of exceptional gravity—that is, retroactivity of a law; it applied to all the anterior acts, while it is admitted by many legislations that penal laws are not retroactive.

The law stipulates particularly "They will be punished by death those who knowingly have manufactured or detained with a view to put into commerce, or distribute, put on sale, or sold articles destined for human nourishment dangerous to public health."

All the accused who were arrested appeared before the High Court of Justice which is presided over by a former barrister of the Casablanca Bar, Maître Kedara. The debates were naturally very animated and the principal seller of the toxic oil claimed that the charge under which he laboured was without foundation, for he has always declared to his buyers that he was selling mineral oil and not household oil. Besides this principal defendant added that he was not obliged to verify the use to which his customers put this oil. A defending barrister raised the point why the Americans (Nouaceur Air Base) were authorized to sell this mineral oil to which the public prosecutor replied that this question was outside the debate.

The defendants try by all means to escape from the heavy accusations which are weighing on them and raised many questions of procedure. In this way, an incident fairly ludicrous arose. Among the toxic oils sold was a harmful brilliantine oil. Now the defense declared that the brilliantine oil was not an alimentary product and there was no reason to prosecute those who were inculpated of having sold brilliantine oil. But the public prosecutor replied that it was not only a question of alimentary products which would be absorbed by mouth but products which penetrated by other ways.

It was then that the defence proposed making an experiment before the court and asked permission to allow the- accused who were selling brilliantine to anoint their hair and their scalp with the brilliantine which was not harmful. The President protested against this suggestion saying that it would be to make oneself an accomplice in crime to allow such an act before the court. The question of the defence was withdrawn by order of the President.

Georges Khiat

These sellers of harmful oil had accomplices in some shops and had the audacity to sell their products with trademarks of "The Stag" and "The Crescent". As the brilliantine which was put into circulation, it had the "virtue" of rendering people bald.

The trial which has become so tragically notorious lasted several days. The High Court of Justice pronounced five death sentences, three of the defendants were sentenced to hard labour for life. The sellers of the brilliantine oil have for the present been released while awaiting the result of the experts' report which was ordered by the High Court. All the other defendants were acquitted. This judgment of the High Court has resulted in an appeal being made before the Supreme Court. The defendants through their lawyers have pointed out many flaws in the procedure of the trial.

First Judicial Impressions

The following paper was read by Judge Reuben Oppenheimer, at a meeting of his law club, The Wranglers, on October 15, 1959.

Judge Oppenheimer was somewhat reluctant to allow the publication of this paper, but was persuaded by the Editor of the *Journal*, and some of his fellow club members, to do so.

It is seldom that one has the opportunity to read as penetrating and sensitive an account of the personal impact of his duties and responsibilities upon a new judge.

by Reuben Oppenheimer • *Associate Judge, Supreme Bench of Baltimore City*

TO EVERY LAWYER who becomes a judge comes that unforgettable moment when for the first time, in his unaccustomed robe, he ascends the few steps to the bench, looks about the courtroom, so unfamiliar from this perspective, bows and begins his new life. No professional practice, no reading, no pondering over the history and meaning of our legal system can adequately prepare for that experience. Far more is involved than a change of occupation. The constant conferences with clients and partners are over, the telephone no longer shrills by day and night, your office is now your chambers, and the old solacing view over the harbor with the ships and piers and water is replaced by brick façades and traffic jams, or by blank walls. The daily easy intercourse with associates and other members of the Bar is no more; you hear voices murmur "Your Honor" and wonder, at first, to whom the murmur is addressed. No longer are you a participant in the seething world of affairs; lonely and insulated, you are a privileged spectator in a drama whose cast and settings change with every case, and as each curtain falls you find, to your amazement, that it is you who brings it down.

Memories from the past live with all who change their habitat or occupation. It is the impact of the world into which you enter, the sudden realization of its meaning and values, which is the new stuff of life. It may not be amiss briefly to tell some of my reactions before that impact fades into accustomed ways.

The duties of a judge have made me realize more fully the significance of our system of justice. I have found that I am a part of something bigger than myself, my conscience and individual judgment spurred and conditioned by rules worked out by our profession through the centuries, by statutes and ordinances, some ancient, some changing year by year. Enswathed in silk and ceremony, the judge in some respects is but a cog in a system designed to minimize his limitations as a man, to supplement his reason, to give what he says and does the larger meaning of the ancient framework which surrounds his every act and word. Any institution for the government of man must, by its nature, be imperfect; any profession can only be an informed striving, not a science based on absolutes. But this bundle of rules and laws, this constant scrutiny of the impact of the facts upon our principles, this screening of the testimony one can hear through the sieve of human weaknesses, has, one finds, one shining virtue. It works. It brings to a peaceful, orderly end every dispute that men may have as to their legal rights and obligations. When a case is over and the lawyers close their brief cases and the litigants quietly leave, the man on the bench is witnessing one of the greatest triumphs mankind has won in its recorded history.

Let me quickly add what every judge must realize from his experiences on the bench as well as at the bar. The judicial determination of cases is only part of the rule of law. Litigation is only a segment of the law in action. The advice that lawyers give, the documents they draw, the plans they help fashion or conceive, the study of the tax statutes, federal, state and local, whose results are playing so large a part in our national mores, today take far more of our profession's time and energy than the hours spent in court. The proceedings of administrative tribunals directly affect more people than do the adjudications of state and federal courts together. Yet behind all the advice and draftsmanship, the tax, labor and other administrative specialization is the realization that the law must govern, and that in case of doubt, the courts may be called upon to decide.

People Respect the Law

The admiration for the workings of our rule of law with which a new judge so inevitably is engulfed could be but professional narcissism were it not for his observation of a fact far more important than the details of the system into which he has been drawn.

One of the unique features of the Baltimore Bench and Bar is the system of Law Clubs, which has now flourished for approximately fifty years. There are about ten such clubs, composed of from twenty-five to forty members each, comprised of judges and lawyers, young and old, who meet for dinner once a month. Histories of the two oldest of these clubs, with records of the papers read, have been privately published.

People respect the law. There could be no more overwhelming injunction to humility than the deference which the men and women who come into our courts, the parties, the witnesses, the jurors, the spectators, even the defendants in criminal cases, pay involuntarily, spontaneously, to our judicial system.

This respect is not necessarily for the men who administer the system, no matter on which side of the bench they sit. The Gallup poll published some discouraging results as to the relative esteem in which the legal profession is held today, and fortunately, judges are not immune from criticism by the Bar, the press and the public. It is the institution which people accept, and they accept it not just because it exists or because it is old, but because they know it is theirs, and, with all its imperfections, the best way of trying to achieve justice that has been evolved. I know of no more heart-piercing experience than when a man on the witness stand turns to the bench, and, raising his eyes to mine, says, "Your Honor, this is the way it happened." This is the day for which he has been waiting, and he believes—I only hope with reason—that justice will be done.

It is the acceptance by people of the judicial institution which makes it work, and it is people who give it life. All the dramatists and all the novelists of the ages together cannot portray the ever-changing, ever-pulsating panorama of human personality which the courtroom daily presents. As one witness follows another to the stand, takes the oath, is examined and then cross-examined, there is a distillation of the essence of individual beings, infinitely diverse, infinitely illuminating of the ways and thoughts and emotions of man. No theatrical spotlight, no writer's understanding and skill, not all the new social and medical techniques, can hope to match the quick, sometimes blinding projection of personality, the passions, broodings and conflicts, the strivings and desires, the pressures and conditionings of environment and heredity told or unconsciously portrayed in this unending procession. Nor is this accident. Every institution which survives develops its own technique for searching out and making felt the inner beings of the persons with whom it deals. The edifice of the common law, its foundations deep in principle, buttressed with rules, enriched with panoply of rites, is built for men and women. It can perform its function of seeking justice only if it first finds truth. Centuries of thought and trial and error are concentrated in our procedure. The step up to the stand the witness takes, the solemn oath, the courtroom hush, the quiet voice of counsel, the ordeal of cross-examination, the presence of the judge above him, all are designed to lift the witness, for the moment, from his usual ways, and yet to show him as he is.

The truth, of course, does not always emerge, or, if it does, it may be only part of the whole. Even when witnesses try their best to recollect the details of a past event, memories can be colored and treacherous. Sometimes, as in domestic relations cases, the parties themselves do not realize all the forces of personality and circumstances which bring them into conflict. In the criminal courts, we know the frustrations of our struggle to find the real causes of human deterioration. The path of justice rests, in part, upon the bog of human fallibility; we can but do our best with what we have and constantly remind ourselves that adjudication and perfection are not synonyms.

No Danger of Too Much Conformity

The fear that Americans are being pressured into a robot-like conformity would not long survive experience in a Baltimore *nisi prius* court. The wonder of the variety of human beings there shown can never fade. Shakespeare's seven ages of man parade, disconsolate, defiant and benign, from the bewildered child one hears in chambers to the serene dowager who brings her halting dignity into the public gaze. Even Henry Higgins would be hard put to identify the origin of all the accents, manners of speech and idioms. The countries of the world reflect themselves in their descendants here. One day, one hears a cultured refugee from Nazi Germany, the next the passionate repercussions of a Sicilian family quarrel; the next day brings echoes from Athens or Scandinavia. Baltimore, beneath its staid exterior, has always been a haven for adventurers and seekers for our freedom from other lands, and their progeny, ensconced in our traditions, still display the warmth and richness of their inheritances. Immigration has dwindled, almost vanished, but we have, and in our courts daily see, representatives of internal movements, immigrants chiefly from the South. These people, as we know, bring their own problems of adjustment, but they bring into the courts the tang of different ways and personalities.

There are distortions in this microcosm of our city. In the criminal court, the judge must constantly remind himself that the people with whom he deals represent only a minute proportion of our citizens, and that there are many more evil deeds than evil men. Even in the sordid tragedies of weakness, vice, disease and ignorance occasionally there gleams a golden thread. I shall always remember one afternoon, when I was sitting dejected in my chambers, thinking about an adolescent I had sentenced to the Reformatory for Males because there was no other place to send him. He had no home, and had been in conflict with the law for years. Probation had been tried to no avail, the Training School for Boys had been able to do nothing for him, and I saw only a life of criminality ahead. Just then, my bailiff asked if I would see a woman who had been in the court when the case was heard. She came in, quiet, unostentatious, a neighbor, not related to the defendant in any way. She had children of her own, she said, and thought if I would put the boy in her custody, there would be hope for him if he resided in her home as part of her own family. There he went, and there, I hope, he still is.

What, I often wonder, do these parties and witnesses, these people many of whom for the first time see a court in session, think of it? For many this is a climax in their lives, their day to tell their story, to have their rights proclaimed or lose their battle. Do they understand how and why they win or lose? Try as we can, judges cannot always clearly explain to laymen the legal principles which

govern the decisions, and yet how important it is that people understand this is no esoteric game, that rights do not depend upon what must sometimes seem an abracadabra of legal jargon. Of course, lawyers understand, although one, at least, will disagree with the result, but how difficult and yet how vital, to put in simple words the findings of the facts and the principles which govern on the facts so found, so that the parties, witnesses and spectators will have at least some idea of why the judge decides the case as he does.

Sir Patrick Devlin, in an address before the Judicial Conference of the Second Circuit two years ago, emphasized this function of the trial judge. He said:

> . . . it is not enough to be correct in law if you don't give the decision in a manner which satisfies the ordinary citizen. That is the main function of the trial judge. If he goes wrong in law the Courts of Appeal can correct him. But if he makes a bad impression in the way in which he conducts the trial, Courts of Appeal have no way of correcting that bad impression. . . It is through his Court, more than the Appellate Courts, that the public passes—jurors, witnesses, members of the public, perhaps more interested in the trial than they are in Appellate procedure. They come in and they pass away. They are the silent judges of our system of justice. Whether they approve or disapprove, upon that depends the respect for the law which in both our countries is at the basis of all its meaning.

The "Rabbit Murder Case"

Interspersed in the ceaselessly moving panorama of people, corroborating or contradicting what they say, are the things, the properties in the eternal drama. In the search for truth, how important can be the mute testimony of the inanimate.

There was the trial I think of as the "Rabbit Murder Case". A woman was charged with murdering the man she lived with. Admittedly, she had stabbed him with a pair of garden shears. Her story was the usual plea of self-defense. She had been working in the little lawn back of their home when he came to her drunk, upbraided her and beat her, forcing her against the wall, and, to protect herself, she said, she struck out blindly with the shears that she was holding. The body of the man, the policeman testified, was in the position she had described, consistent with his having hemmed her in against the house. How was it that the shears were in her hand? Her explanation was she had been cutting grass for her pet rabbits when the man attacked her. Yes, the policeman said, the pet white rabbits were within her house; he showed their pictures and, more significant, on the concrete walk next to the lawn, he found and photographed little bits of blades of grass, obviously cut and gathered for the rabbits' food. The verdict was not guilty.

There rarely is a case, I find, without a setting. House or tavern, store or street, the background is sketched in the testimony, often with a few evocative words whose quick illumination a novelist might envy. What pictures of Baltimore, old and new, are so projected, and what diversity there is behind the sober fronts of edifices! Sometimes I feel as though the bricks of the row houses are only gauze curtains, briefly raised in court to show the teeming vitality of life within. The marble steps often appear as points of vantage for the witnesses, or even as the center of the scene.

I have referred to the difficulty of explaining decisions to the parties and witnesses. Sometimes, it may be even more difficult to explain the result which you have reached to yourself. The law is there, the authorities, if not always clear, at least available for consultation, reconciliation or choice. The Court of Appeals hovers to correct the legal errors you may make. But what is it that brings decision on the facts?

When I was appointed to the bench, I promptly reread Cardozo's *The Nature of the Judicial Process*. Great as is my admiration for that judge, I must confess his book has failed to solve, for me, the nature of some of my own processes. Questions of fact do not depend on principles. Findings on evidence do not reflect the weighing of the imponderables which Cardozo so admirably analyzes. Why do I believe one man rather than another? There is no formula to test the truth, no touchstone to show falsity. Often the scales seem clearly to sway one way—the impression the witnesses make, corroboration, dispassionate observance by persons not in any way involved, may lead to certainty, or at least, to reasonable belief of what the evidence preponderantly shows. In other cases, however, the scales tremble in even balance. They may be tipped by arguments of counsel, a lucid summary, the pointing out of some small detail whose significance had not been clear to me. If the scales retain their even balance, of course, the burden of proof has not been met, but these cases, I have found so far, are rare. What part does the subconscious play? Am I influenced by sympathy with the position or the plight of one litigant, or do I feel, instinctively, that a particular result would be in accord with substantial justice, perhaps apart from the balance of the evidence? I trust not, for that way lies the danger of justice measured by the length of the Chancellor's foot. But how can one be sure? Here again, the importance of giving reasons for the result at which one has arrived is

Fabian Bachrach

Reuben Oppenheimer received his A.B. from Johns Hopkins in 1917 and his LL.B. *cum laude* from Harvard in 1920; a year later he was admitted to the Maryland Bar. Among other associations, he is a member of the Maryland Bar Association of which he is a former president. He has been Associate Judge on the Supreme Bench in Baltimore City since 1955.

emphasized. Whether the opinion is written or oral, the necessity of giving the reasons for your decision guards your judgment.

What I have said on findings of the facts, of course, applies only to cases the judge hears without a jury. In criminal cases in Baltimore over 98 per cent of the trials are so conducted, but here the state must prove its case beyond a reasonable doubt. Let me observe how impressed I have been with the strength and resourcefulness with which in such cases defense counsel generally perform one of the highest duties of the Bar—to show, or try to show, why that burden has not been met.

Of the responsibilities which come to a new judge, to me, the heaviest, the one whose burden never lifts, is the power of the position. Appellate judges declare and frame the rules of law which bind us all; the *nisi prius* judge in thousands of the cases he decides is final arbiter of the rights, the liberty of the individuals who come before him. The right of appeal exists in every case, but often, in civil cases, the loser cannot afford the cost, and even if he can, in civil as well as criminal cases, the trier of the facts generally is not reversed unless the record shows his decision clearly to have been wrong.

The importance of a decision to the parties is often not to be measured by the amount of money involved. Lives may be and often are affected by the results of litigation which to more affluent persons, seems to be concerned with almost trivial amounts. The loss of a home, however modest, recovery for injuries, rights to compensation for accidents or to unemployment insurance—in these and many other types of cases, the sums at issue may seem relatively small, but a man's future may depend upon the outcome. In the criminal court, freedom or even life, may be at stake. Here is the judge, a human being beneath his robe, with the limitations inherent in every man, knowing that in most of the cases he decides his word will be the last.

Nisi Prius *Judge Acts in Solitude*

The *nisi prius* judge has not the advantage of consultations and conferences with his associates which appellate work affords. The pressure is too great, there is not time for discussion except in occasional instances and then usually on some point of law. Generally, as Chancellor Bland noted over a hundred years ago, the *nisi prius* judge must act in lonely solitude.

True, on motions for new trials in criminal cases, in which the defendants may have the transcripts made and counsel appointed at public expense if they have no funds, our full Supreme Bench, sitting *en banc*, has greater power than the Court of Appeals, but even here, great weight must be given to the verdict of the man who heard and saw the witnesses. After a guilty verdict or the denial of a motion for a new trial, there is the sentence to be fixed. The judge can ask for a probation study and report, but it must be his decision, and his alone, as to whether probation is to be granted. If he decides upon imprisonment, he must fix the time, within the broad range of the statute or the common law. The term of the imprisonment may be subsequently curtailed by the Parole Board, but that possibility does not affect the court's responsibility. Here there are no rules. The record, circumstances, the nature of the crime and, more important, of the criminal must all be weighed, and then, the awesome burden must be met. One can only hope for the strength and the humility to make the power tolerable.

Let me briefly return to the general impact upon a newcomer of our judicial apparatus in action. Seen from within, the dichotomy of our technique is impressive. The Bench adheres strictly to the common law, as modified by statutes, in contracts, torts, commercial and criminal law and in equity. In other fields, in what Roscoe Pound calls "sociological jurisprudence", it avails itself of the skills of the other professions which we have learned can help us in the endeavor to attain justice in the fullest sense, the doctors, psychiatrists, psychologists, probation and parole and social workers. In the same court, on the same day, the same judge may first delve into the intricacies of Lord Mansfield's rule as to the evidence admissible in a charge of bastardy, and then, having found the child illegitimate, may call upon the probation staff to supervise support and perhaps upon a psychiatrist for advice as to custody. In the criminal court, before the trial, the judge may send the defendant to the medical officer of the Bench for an examination as to sanity. If he is found guilty, the court again may turn to other professions for guidance. He may consult the probation department or send the man to our Patuxent Institution to determine whether or not he is a defective delinquent. The old and new techniques go side by side.

I was amazed to witness the amount of administrative and legislative work which the Supreme Bench performs in addition to its strictly judicial duties. Rules are made and necessarily from time to time revised, personnel appointed or approved in the departments the Bench supervises, budgets prepared, assignments planned. One of our many committees constantly is faced with problems of space in our beautiful courthouse, now bulging at the seams. Our Thursday luncheon meetings hardly give us time to hear and consider the matters on which our committees have been working and to decide the issues upon which we must act *en banc*.

It was remarkable to me to find how much the Bench, on its own initiative, has done to improve the administration of justice within its jurisdiction. Here is a body only briefly referred to in either the Constitution or the Code, with no express powers as an operating organization, and yet, in addition to all its administrative work, without the need of legislation, it has set up a juvenile court, and a family court and has now established, on an experimental basis, a plan to have a motion judge always available to the Bar to pass upon preliminary matters before trial and expedite the progress of cases through the courts.

Finally, one of the greatest satisfactions I have experienced is working with my brethren of the Bench. A judge plays no part in the selection of his associates. It is all the more pleasurable to find one's fellows understanding and helpful, congenial, joined in dedication to our objective, the doing of justice.

A Common Purpose for the Free World

Addressing the fourth session of the Assembly of the American Bar Association last August in Washington, Senator Fulbright spoke of the problems facing the United States and the world—problems, he predicted, that will take many decades to solve. What we need most, he suggested, is a closer co-ordination among the Western allies to counter the Communist opposition.

by J. William Fulbright • *United States Senator from Arkansas*

I AM HONORED to be included on this program and to have the opportunity to share with you some of my thoughts and hopes regarding our position in the world. I am particularly happy that so many of our British friends have come to this meeting, because neither the United States nor Great Britain can have a fully effective foreign policy if either one gets very far out of step with its partner in this Anglo-American alliance of ours.

I understand from reading the local newspapers that the heat and the large number of social functions have exhausted our guests, and I wish to extend my sincere sympathy to them. I am particularly sympathetic because on yesterday the Senate was in continuous session for eighteen hours. We did not recess until five o'clock this morning, and I finally got home. So we are all debilitated together.

I am also very pleased that on last Friday, according to the *Washington Post,* someone pointed out to the officials of this Bar Association that the speakers' list was conspicuously short on Democrats, and that as a consequence I was invited.

I was, however, distressed to read in this same article that no tea was provided for our guests from Great Britain. I can assure our friends from across the sea that after the next election, when the Democrats have more influence in this organization, we will see that tea is provided; that is, of course, unless in the meantime you have acquired a taste for some other kind of refreshment.

It is not necessary to remind our guests that this is a presidential election year. We do not expect you to understand us during this period. We only hope that you will bear with us for three more months.

My comments today are, of course, directed primarily at my fellow Americans, for it would not be hospitable to suggest that our guests or their Government should mend their ways. According to the press, both our American political parties seem agreed that foreign policy is the main issue in the coming elections. However, foreign policy is not a thing apart. To a degree not fully appreciated by our own people, our foreign policy is a summation of all our policies.

Our nation's foreign policy is so dependent upon our strength and our competence in other fields that it is merely one aspect of our defense policy, our economic policy, our agricultural policy, and, above all, our educational policy. It is, in short, a reflection of our national conception of ourselves and our role in the world.

Failure fully to appreciate this fact accounts, I think, for a curious ambivalence in the American approach to national policy. I emphasize *national* policy as distinguished from foreign policy or the various segments of domestic policy. If one looks at the United States by itself, one sees an economy which, though it still contains isolated pockets of deplorable poverty, has nevertheless achieved a hitherto unknown level of abundance and productivity.

The American People Are Not Happy

Yet, if one probes more deeply beneath the chrome-plated surface of American life, he comes inescapably to the conclusion that the American people, by and large, are not happy. The incidence of mental illness and of physical ailments associated with emotional stress is increasing rapidly. American doctors last year wrote almost fifty million prescriptions for the various drugs that come under the general heading of tranquilizers. Every year the waiting lists of psychiatrists, psychoanalysts and psychotherapists get longer. It has occurred to me that perhaps one of the difficulties is not in ourselves as individuals but in ourselves in our collective capacity as a nation. It would be helpful, I think, if the developing science of psychiatry could make a study of national egos and motives and personalities; for it seems to me that nations have quite as hard a time understanding themselves as do individuals.

I believe that such a study would conclude that America's trouble is basically one of aimlessness at home and frustration abroad. Webster de-

fines "frustration" as a state which results when one has been prevented from attaining a purpose. The American people have attained their private purposes almost too well at home; but beyond their personal material needs they have not yet recognized an objective or purpose which inspires their real interest.

In their relations with the rest of the world, many Americans feel that we have done all the right, decent and noble things to no avail. In two decades we have fought two wars, one global and one limited to Korea; we have poured out $78 billion in foreign aid of one kind or another over the world; we have sent our sons to places most of us had never heard of. Yet we find our Vice President stoned in Carácas, our President kept from Tokyo by howling mobs, and our flag trampled in the dust in Panama, in La Paz, and elsewhere.

Above all, we find the lengthening shadow of the hammer and sickle creeping forward through Asia, through Africa, and even into the Caribbean off our coast. How and why this has occurred is surely a natural and legitimate question.

Now, as I suggested earlier, I do not think we can find separate solutions to our problems at home and to our problems abroad. They are all really facets of the same problem. And this problem is one which is common to the West, although it is perhaps more acute in the United States than elsewhere.

It is a paradox that we suffer both from aimlessness, or lack of purpose on the one hand, and from frustration, or failure to achieve a purpose on the other. This unfortunate condition results, in part at least, from confusion regarding our purposes and our objectives especially in regard to our relations with other nations. I think we have tended to set our goals too low at home and too high abroad. We have tended to expect either too little of ourselves, so that the accomplishment of it gives us no great satisfaction, or too much, so that failure results in severe frustration.

The Cold War Is an Era Not an Episode

May I elaborate upon this latter aspect of our affliction for a moment. Historically, our excursions into foreign affairs have been primarily military—painful experiences which were to be gone through as quickly as possible so that we could return to life and to business as usual. Even when we are not dealing with strictly military matters, we still use military terminology. We talk about the "Cold War" and about "psychological warfare", in —to use a cliché which I am thoroughly sick of—"the battle for the minds and hearts of men". I think we still tend to regard the Cold War as an episode rather than an era, although it is already a mighty long episode.

Our frustration results from the discovery that we are not able to fix things up quickly; that in spite of our prodigious efforts, a peaceful, free, secure and prosperous world has not resulted. The flaw in our approach is the time span in which we have sought to achieve these objectives.

If I may illustrate: It is not uncommon these days to hear brave words about instituting the rule of law among nations, and it is suggested that a great conference should be held to promote it. It seems to me to be a little unrealistic to expect this when we are not able to persuade two thirds of the Senate to repeal the Connally Amendment.

I may say that I am one of the two Senators left in the Senate who voted against this Amendment—its adoption in 1946—and I am still opposed to it. Of course, I might add, the fact that I am only one of two might be one of the explanations of why more of them don't vote against it.

It is difficult for me to believe that other nations will take us seriously when we speak of the "rule of law" among nations so long as we retain the Connally Reservation. Certainly I don't see how they can avoid believing that we are either insincere or do not understand what it means on the one hand, or that we are hypocritical on the other.

I recognize, of course, that there are honest and sincere men among us who view the Connally Reservation as the last bulwark of our national sovereignty, as one of our last defenses against the encroachments of a strange and hostile world. To these, I can only say that they misread, in my judgment, the meaning of the times in which we live. As much as some Americans may dislike it, the United States has been thrust into the center of world affairs. Either we move to strengthen the mechanisms of world peace—of which the World Court is a conspicuous example —or we continue to suffer increasingly the frustrations of a world in which there is no real peace.

The Velocity of Change Will Grow

It has been said so often that it is trite, but it seems not fully to have penetrated our consciousness: We live in an era of unprecedented change and upheaval. The only predictable thing about it is that the velocity and the violence of the change are likely to increase.

Our world is in a period of genuine transition. This transition began with World War I, which in its turn marked the beginning of the end of that earlier, more stable era characterized by domination of the world by the nations of Western Europe. Not only were these powers pre-eminent in industry and in the arts and sciences, but their economic and political power was worldwide. Their colonial empires were more vast than their homelands.

During the years since World War I and the present, we have seen the liquidation of the old colonial empires and the emergence of a new authoritarian empire under the leadership of the Soviet Union. It is difficult for the West to adjust to this unprecedented rapid growth of the Communist power. Since the outbreak of the First World War they have gained control of 40 per cent of the world's population, 27 per cent of its territory and 30 per cent of its industrial capacity. This should be enough to cause any thinking person to suspect that all is not well within the Western World and yet any significant change in our traditional methods of doing business is grudgingly considered and reluctantly accepted, if it is not rejected outright.

One significant change, fraught with yet unknown consequences, is the enormous expansion of the number of independent nations and their admission in the United Nations. In 1945 there were fifty-one members. Today there are eighty-two, with fifteen more recommended by the Security Council and awaiting only General Assembly approval and, of course, there are more on the way.

I do not wish to imply that all these developments are bad, although some appear to be premature and threaten to end in chaos. However, that may be, these changes have resulted in a fluid, unstable situation among the non-Communist peoples. Such a situation, if we have the imagination and the desire, presents us with an opportunity to play a constructive role in the development of these societies. However, if we neglect these opportunities these unstable communities could easily fall prey, as they threaten to do, to chaos and to Communism.

In contrast to these unstable conditions in the former colonial areas, the Communists have managed to consolidate and stabilize their empire. I do not overlook the centrifugal tendencies that *may* develop between the Chinese Communists and the Russians. Nor do I minimize the fact that the Soviet Union, no less than the West, is subject to the pressures of social and technical change. But it is a fact that since the ruthless suppression of the Hungarian Revolt, there have been no violent upheavals in the Soviet empire. Certainly it would be dangerous if we were to base our policies on the hope, or the expectation, that internal stresses and strains in the Soviet bloc will eventually destroy its monolithic structure.

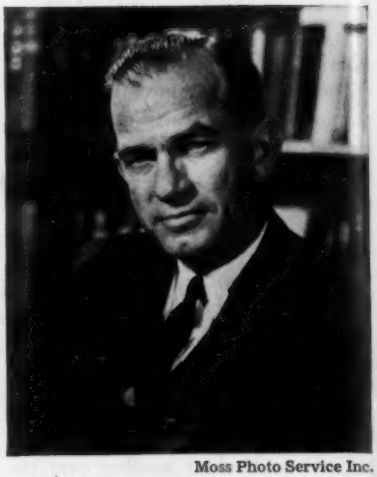
Furthermore, we will be courting disaster if we underestimate the abilities of the Soviet Union and its satellites in the fields of industrial production, science, education, or even the production of consumer goods. And we had better not underestimate the appeal which Communism seems to have for the underdeveloped and newly independent peoples of the earth. We do not like this, but it is a fact that oftentimes newly independent peoples, faced by overwhelming problems and at the same time spurred by demands for immediate improvement in living conditions, succumb rather easily to Communist promises of plenty and, perhaps even more importantly, of self-respect.

I suppose it is characteristic of human beings, especially if they are reasonably comfortable, to be reluctant to recognize change; and even when change is apparent, to adapt to it. Evolution and the survival of the fittest are concepts we understand when applied to plants and animals, but somehow we never seem to recognize that these concepts apply to us. Thus, I dare say that, as we grow older, we are not as likely to realize that we are becoming hard of hearing as we are likely to believe that people just don't talk loudly enough.

The Soviet Union Is Here To Stay

Nevertheless, we can discern some factors which may enable us to begin to comprehend our relationship to the world and avoid some further frustrations. For example, we should recognize that the Soviet Union is here to stay, for some time in my opinion. We should acknowledge that the Soviet Union has demonstrated strength and staying power far greater than we had anticipated only a few years ago. We should acknowledge—much as we dislike it—that Communism does have an appeal to newly independent poverty-stricken peoples.

But I should say the most important thing for us to recognize is that the period of change which is now under way will be with us for a very long time. Whether we describe this period as one of cold war or peaceful coexistence, it will not be brought to an end by the development of any short-range, overnight, panacea. It will be decades before stability will be a characteristic of the new nations. It will be decades before we solve, or control, the population problem and the food problems so closely associated with it in these new nations. It may be a long time in these new states before the need for a strong and stable government can be reconciled with the desire and the need for freedom of the individual citizen. We believe we have the correct formula in our constitutional democratic form of government; but it becomes more evident every day that illiterate, destitute peoples do not have the background, the civic consciousness, the resources, to apply successfully such a system to the conditions which confront them.



Moss Photo Service Inc.

Senator Fulbright

It will be years before the emerging nations of Asia and Africa and the older nations of Latin America develop the economic institutions and accumulate the capital necessary to give them a self-sustaining rate of economic growth. Yet we in the United States continue to approach this problem as though it were susceptible to a year-to-year solution. There are still many Americans, some of them in the Congress, who hope that somehow—maybe by next year—we will be able drastically to reduce our Mutual Security program or perhaps to eliminate it all together.

We are treating our relationship to the world of the twentieth century like a quack doctor who prescribes aspirin for tuberculosis—and we are likely to end up not only frustrated but having paid more for quack remedies than we would have paid for a long-range treatment designed to bring about a cure.

Too Many Short-term Projects

Because we as a people have not accepted the idea that we are involved in a long-term struggle, we have failed to plan ahead, and as a result we have

lost many precious years with improvised superficial short-term projects. Two years ago the Committee on Foreign Relations proposed that the Development Loan Fund should be given adequate resources and the authority to plan ahead for five years. Its proposal was defeated in the Senate—and, I am sorry to say, with the assistance of the Administration.

What business in this nation could succeed if it were denied the right to plan ahead more than one year? Such a business would not be able to recruit employees more skilled than migratory help. Yet that is the framework into which we force this Government's competitive struggle with the Soviet Union for the allegiance of the peoples of this world.

A willingness to develop policies for the long pull would enable us to determine the quality and size of our programs instead of pursuing policies of an emergency nature conceived largely as reactions to Soviet initiatives. A recent example of such an emergency reaction which can be very expensive and ineffectual is the proposal for Latin America, submitted to the Congress recently.

We ought, for example, to be giving more thought, in concert with our friends in Great Britain and in Continental Europe, to ways and means of better harnessing our resources to achieve common objectives. We in the United States have been gratified by the great economic progress Europe has made since the war. We have been encouraged by the steady growth of European economic and political institutions. Whatever strengthens Western Europe strengthens freedom, and we therefore welcome it even though it means keener competition for our own businesses. We do not fear straightforward commercial competition. We do, however, object to discrimination, and we are worried about some signs that the European Common Market may turn into an instrument of discrimination and protection rather than an instrument for further increasing trade, production, and economic growth throughout the West.

Discussions have already been held on ways and means of concerting Western policies and programs in the worldwide struggle, not only to preserve but also to promote the human values which are important to the West. These efforts must be pressed forward. The threat we face is not a threat against the United States alone, or against Great Britain alone, or against France alone. It is a threat to all of us; and if we do not meet it together, we shall assuredly suffer separately. Surely unless we pull together economically, we will not be able to *compete* economically with the Soviet bloc which has managed to eliminate trade barriers extending from the Baltic to the Pacific. We have experienced instances of severe Soviet competition in recent years in tin, in aluminum, in benzine, and, more recently, in oil.

To resist effectively the ever-increasing pressure of the Communist world, it seems to me the Free World must develop the machinery for co-ordinating its military, its economic and its political activities. What an incalculable waste of manpower, brains, and wealth is involved in our policy of requiring the British and the French to duplicate so much of our defense hardware. Even more extravagant are the separate research and development programs in the field of missiles and nuclear physics. The divergent and often conflicting policies of the several nations of the Free World are at a disadvantage over the long pull against the united power and purpose of the Communist World. The Free World, by a large margin, excels the Communists in material resources and trained manpower. What it lacks is the acceptance by its people of a *common purpose* and the means to put such a purpose into effect. It is true that we have the common purpose of preventing a third world war, a very worthy purpose indeed. But to achieve such a purpose we must maintain the strength of the Free World relative to the Communist World at all times or we will tempt the Kremlin into taking a rash and dangerous adventure.

As we have been in the past, we are still in the present—frustrated. We are confounded and frustrated by a dilemma which demands that *either* we move positively and boldly in the creation of common policies for the Free World, which is repugnant to our traditional, historical isolationism, and also will be costly, *or* we sit by and watch the Communists extend their power and influence, as they have in Eastern Europe, in Asia, in Cuba, in Latin America, and today—this moment—in Africa.

Preventing Another War

Sooner or later, I am sure, the pressure of expanding Communist influence will force us to recognize the necessity for much closer co-ordination of our policies and our resources. I am suggesting that if we *delay* it will be more costly and more painful than if we start now. The North Atlantic Treaty Organization brought hope and confidence to the nations of Europe, and it has prevented a war in that area. The expansion of the same principles into the economic and political fields and among additional nations will, in a like manner, bring hope and confidence to all other free peoples. And, perhaps, most important of all, it will prevent another world war. A large number of weak, disunited and unstable democratic nations is an invitation to aggression.

Whenever a public official mentions uniting the Free World our super patriots immediately shout that he is a "One Worlder" and therefore a crackpot not to be trusted. Obviously, it is not likely to be "one world" in the foreseeable future if only because a third of it is already in the Communist camp. I do not deny that the concept of a united Free World is a difficult one to envision under the circumstances of the present. However, it seems to me that it should not be beyond the capacity of ourselves and our friends who cherish human liberty, *first* to agree upon a long-term objective of common markets, common defense and research programs and a high degree of co-ordination of political policies in other fields; and, second, to formulate plans and to take steps toward implementing these objectives, and without any undue delay.

The problem of reconciling the ideas of unity and diversity within a society is an old one. Each free country has found some kind of solution to this problem in its own particular manner,

some more successfully than others. It should not be impossible out of the vast experience of these nations to find precedents and methods which might apply on a broader scale. In any case, the Free World needs a unifying purpose, an objective worthy of great sacrifice and self-discipline. We need it not only for our own sake, but we also need it if we are to inspire the newly created nations with confidence in us and in our future.

Perhaps the most persuasive clue to the proper policy for us is to be found in the fears of the Soviet Union. Russia's greatest fear is that the great democracies of the Free World will act in a united and constructive manner, or will in fact become united under some new and closer arrangement. This is shown by their persistent efforts to divide us, to drive a wedge between this and that free nation.

Our task, as champions of human liberty, is to draw closer together in all fields of international activity and at the same time to preserve the essentials of human freedom. Recently, a distinguished Spaniard, Salvador de Madariaga, put it quite well when he wrote as follows:

> The trouble today is that the Communist world understands unity but not liberty, while the Free World understands liberty but not unity. Eventual victory may be won by the first of the two sides to achieve the synthesis of both liberty and unity.

Joseph Nye Welch—1890-1960

J. N. Welch (that is the way he signed his checks and letters) or Jose (which is what he liked to be called) was a national figure at the time of his death on October 6, 1960.

Newspaper reporters, radio announcers and broadcasters have told the essential facts of his life. They have done so accurately and with true emotion.

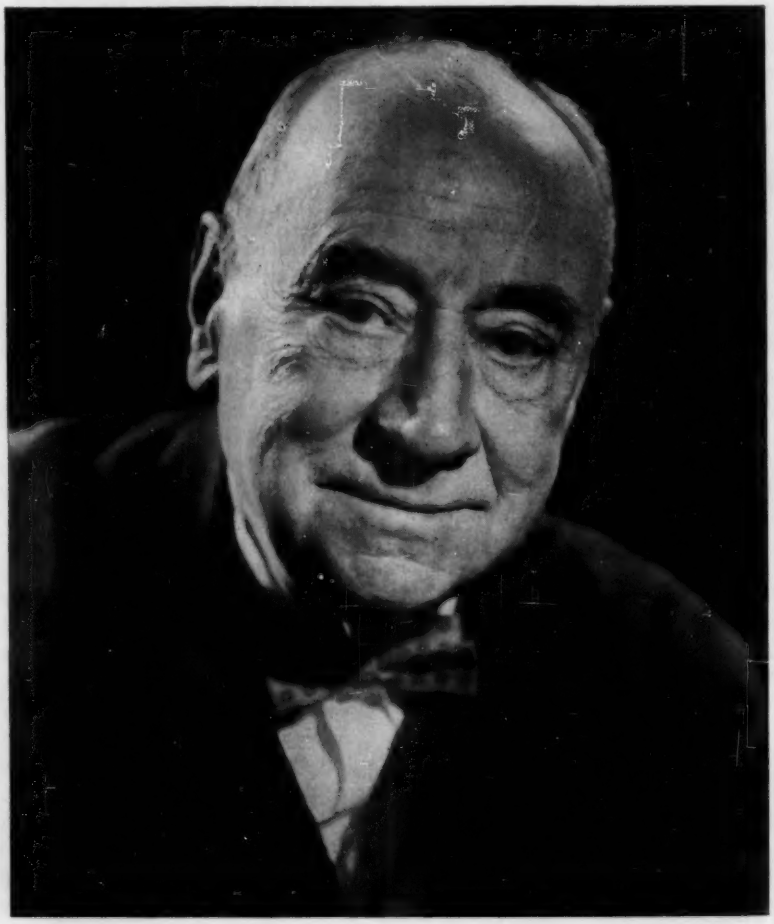
Their words cannot be improved upon; but perhaps the *Journal*'s readers, who are Jose's brethren, would be interested in some facts that have never been printed.

In 1919 after World War I had ended, I was managing partner of Hale and Dorr in Boston. We needed a good trial lawyer. Jose applied for the job. That he was Phi Beta Kappa and *Harvard Law Review* were favorable factors, but I hired him for a different reason.

We all know that the beautiful State of Iowa is so flat that you can almost see the whole of it at a glance, and its counties are marked off with geometric precision. Thrifty Iowa farmers did not need maps and did not want maps. Jose sold them maps. Of course, I hired him.

The first case which gave him a chance to prove his worth and attract attention came to me from the late Monroe Goldstein, of New York, who had been counsel for the National Desertion Bureau. A fiddler in a theater orchestra had fallen in love with a burlesque lady. When she decided to marry someone else, he said some things which caused him to be arrested in Boston for malicious slander. He was to be tried on a Monday and he arrived at our office on Saturday. He had no tangible evidence that the lady had once loved him except her photograph in her birthday suit.

Jose described this as her "working clothes". The photograph was not



shown to the jury but, when he cross-examined the lady, he let her have a surreptitious look at it. (He was holding it behind his back and turning it around.) She asked for a recess and decided to drop the charge.

When Frederick Prince was sued by the U. S. Treasury for millions of dollars on the charge of unreasonable accumulation of surplus, he came to us and the case automatically went to Jose who had become the head of our Litigation Department. A sizable fee was agreed upon. Jose was a sentimentalist but not an impractical one. Just before the case was to be argued in the U. S. Court of Appeals, Prince telegraphed, "If you win for me I will pay you $25,000 extra." The decision was favorable. Prince never paid. Jose refused to sue because, as he put it, "I have already been paid a fair fee."

How and why the United States Army asked Jose to defend it must remain a mystery for a while yet. As Watson used to say about some of Sherlock Holmes' cases, "The facts were extraordinary but I cannot publish them because persons now living could be hurt."

After talking to the top officials in Washington, Jose reported to a firm meeting:

> I am asked to undertake a grueling assignment. It will be long drawn out. I shall have to stay in Washington and I must take two of our best Juniors with me. In exchange, the Army will pay no fee and will not even pay travel and hotel expenses.
>
> Also it is a dangerous assignment. Senator McCarthy is a powerful antagonist. If we have any skeletons in our closets let us say "No" at once.

As managing partner I moved that Hale and Dorr accept the case, assign two juniors to Jose and pay all their expenses. As to their time devoted to the case, they were to render a bill to the firm based on hours spent at cost and the firm would pay it.

The motion was carried by unanimous vote but one partner observed: "Smith has talked Legal Aid all his life and now he has a Legal Aid client in the person of the Army of the United States."

The cost was very heavy but the firm paid every dollar and cent of it.

My partners believe that the "break" in the case came when Senator McCarthy accused us of harboring a "red". That was Frederick G. Fisher, Jr. He entered Harvard Law School in 1945. He was eager to get into bar association activities and spoke to Dean Griswold. The then somnolent American Bar Association was completely unaware of the ardent desires of these young law students (it still refuses them associate memberships) but the National Lawyers Guild was alert and had organized a chapter in Harvard Law School. Fisher became its president. At that time several Justices of the Supreme Court of the United States were Guild members. So were many splendid lawyers and law teachers who used the Guild to prick the American Bar Association into activity.

The charge was outrageous and it outraged Jose who exclaimed, "If there is a God in Heaven, Senator, you will repent your words."

The next morning Jose received hundreds of letters from well-wishers who chided him on the ground that instead of saying "If" he should have asserted "Inasmuch as there is a God in Heaven."

You cannot draw a picture of Jose and put him in a frame. He will escape with the agility of a Houdini.

The best I can do is to quote some sentences written immediately after his death.

On Radio Station WBZ Mr. Leo Egan gave a perfect broadcast. In writing to thank him I said:

> If every lawyer dealt with the radio and press as honestly as Jose Welch did, and if all broadcasters and reporters dealt as intelligently and accurately with law and lawyers as you did, all differences between our two professions would disappear. Had you been Peter Zenger, Jose Welch would surely have been Andrew Hamilton.

In writing an "In Memoriam" for the men and women in our office I concluded with these words:

> He was, in my humble opinion, even greater in other respects. His faith was in beauty, in honesty and in love. To those principles he always was true.
>
> Perhaps his most abiding affection of all was to Hale and Dorr.

If, Gentle Reader, it seems to you that I refer too much to Jose's firm, it is because he would wish it so and would not tolerate anything else. I have drafted this in longhand and he has guided my pencil.

Our only disagreement was about immortality. When Charles C. Burlingham passed his 100th birthday, he wrote his rector: "Soon I expect to have the most important appointment of my life." The good Rector was puzzled and asked "When?"

C. C. replied, "Within 30 minutes after what you call my death."

Jose knows. I must abide by faith.

REGINALD HEBER SMITH
Boston, Massachusetts

Tax Avoidance Can Be Very Unwise: Five Fables for Lawyers

Mr. Michel's argument is that it is unwise and often costly to arrange one's legal affairs on the basis of tax consequences, at the expense of ignoring business and personal considerations. His fables illustrate the danger.

by Anthony L. Michel • *of the Illinois Bar (Chicago)*

TAXES ARE INDEED burdensome today. But beware that the cost of avoidance is not excessive either to your client, to members of his family, to his business or to our country.

The current popularity of tax avoidance has warped our thinking and in many cases its accomplishment is not wise. We must remember that it is often more important to think and work for future profit than to think and work only to avoid taxes. This does not mean that one should not proceed to follow the path of lower taxes when two roads are clearly available to the same desirable spot. But it is important not to follow a path of least taxes which leads to a bad end. Too often in recent years we hear of a successful corporate leader being misled by the attractive prospect of substantial tax savings to devote most of his energies to that end. This, at a time when he should have been forging ahead with all talents available to strengthen the business he knows better than taxes, letting the avoidance of taxes take the place of secondary importance which it deserves. Here are a few simple (they cannot be stated too simply) tales that may illustrate to clients the merit of proceeding cautiously in tax planning.

The Tax Red Herring

John was a business genius. He was a leader of men; he was an organizer; he was imaginative; he was energetic; his character was tops. With the help of his associates the company of which he was president had enjoyed great prosperity for many years and was a leader in the industry.

Only one thing was wrong; he hated to pay taxes.

One of his friends who was smarter than wise told him of an opportunity to acquire on advantageous terms the ABC Company, a corporation which was in a completely different field of operations and which had lost money for several years. Lost much money. "And just think, John, if ABC is merged with your company, your company can obtain its loss carry-forward for tax credits which would enable your company to avoid taxes for some years in the future. There can be credited against the profits of your company in the future the loss of ABC in the past."

Well, the two concerns were merged. The prospect of saving taxes loomed so important that only casual concern was given to the fact that John would be sailing a new ship with a strange crew in strange waters. Of course he had been so fortunate in his own field that it did not occur to him that he could not win at everything. The tax credit became available, but what happened? The industry with which he was familiar had a cyclical downturn and its management problems increased. Its profits dwindled until they became no profits at all. And his staff was overworked, giving time to the difficulties encountered by the recent acquisition with its own novel problems. John continued to do his best. For three years no taxes were paid, but then the new acquisition was liquidated at a substantial loss. The operating figures of John's company after the merger never showed red figures, but the black ones would have been much blacker had John and his staff been able to continue to expend their energy on the business which they knew. Someone had drawn a tax red herring across their profitable path.

Tom's Investments

"Tom is a wonderful son-in-law. He is fine, able and frugal. After the war he took all of his wife's and his savings and invested them in the Make-A-Dollar Corporation. At that time the stock was selling at $10 a share. It was listed on the exchange. It enjoyed an excel-

[illegible]t sponsorship. It was in a field of endeavor which is essential to our society. It paid dividends each year. Shortly after Tom's investment the corporation acquired an interest in an electronics research organization, and the speculators were certain it was a 'growth situation'. Well, in six years it was selling at $70 a share. Now many men would have sold at least some of it. But I asked Tom where he would put the proceeds and told him he would have to pay a capital gains tax so he would only get $55 a share net. And who wants to pay capital gains taxes? I don't. In any event he didn't sell. He's a smart son-in-law."

So spoke a client a year ago. He was reminded that Tom was not as likely to die as he was and that the double tax (capital gains plus estate) was not the spectre in his son-in-law's case that it was in his case. But nothing was done.

Since that conversation we have had a little change in the market. Make-A-Dollar Corporation is again selling at 10.

Waiting To Live

John was in general practice. For that matter he had always been an independent rugged individualist. It was therefore something of a surprise when I learned that he had left this general practice with a firm of other lawyers to become employed in the law department of a large downtown institution.

We lunched together and I inquired why the change. John said, "I could not afford to refuse the opportunity." I asked, "What opportunity?" And he replied, "To make so much more money."

It appeared from the ensuing conversation that John had been making $20,000 a year in general practice. Now the institution had offered him only $17,500 *but* he could participate in its pension program which meant that if he lived until 65 and wanted to retire he would get a pension of $8,500 a year so long as he continued to live. Well, he was already 45 and in twenty years he couldn't hope to save enough ($170,000), income taxes being what they were, to buy himself an annuity when he became 65 that would pay him $8,500 a year for the rest of his life.

That was ten years ago. Since then John has said many times that he missed the independence of general practice and wished he were back in it, but he could not afford it. John died yesterday. Poor guy, he never did get a chance to "live" and retire on that pension.

Grandfather's Will

Once upon a time there was a grandfather who went to his lawyer to write his will. His lawyer was a scholarly man, but great as was his legal knowledge he was not a prophet. His lawyer was also a careful man who had heard much about the burden of taxes generally and had personally suffered more from their impact than one of his partners who was a "tax expert".

So he called in the expert and said, "John, Grandfather wants to write a will. He is a rich man. His wife is not rich. He has one million dollars. He also has four children and eight and one-half grandchildren. He hates to pay taxes as much as I do. Now he wants to leave all of his property to his wife and family. How should he do it and avoid as much inheritance tax as possible?"

And the tax expert replied, "He might do better taxwise by creating an irrevocable *inter vivos* trust, assuming he lives long enough to make it stick as a gift and not a bequest, and assuming he has enough cash to pay the gift tax, but I take it he wants to keep his estate in his own hands until he dies. Well, have him create a testamentary trust by his will of his entire estate, dividing it into two parts. The income from one half of his estate should be paid to his wife for life. She should also be given the power to decide what should be done with it on her death so that the bequest will qualify as a 'marital deduction' and save substantial estate taxes. Grandfather can urge her not to exercise the power, so that her share will pass on to her children just as is provided with respect to the rest of his estate. The rest of his estate should be divided into as many shares as there are children surviving him and deceased children leaving descendants or widows. The income from each of these shares of one half his total estate should be paid to Grandfather's children so long as they live, and when one dies his share should be paid to his grandchildren until the youngest child is 21 years of age when it should be distributed; and so forth. We thus get the maximum marital estate tax deduction and, by giving Grandfather's children only a life interest, we will avoid Grandfather's estate being taxed again as part of his children's estate." And so the will was drawn and Grandfather signed it in the presence of witnesses and died.

After the passage of years the wounds in Grandmother's breast caused by Grandfather's death had healed without too much scar tissue. Grandmother met another man. He happened to know about powers of appointment. He persuaded her to exercise her power for his benefit. Neither Grandfather's children nor grandchildren got much from Grandmother's share of Grandfather's estate.

Unfortunately, the income from the trust estate so long as any of Grandfather's children were alive was pretty small. One of them had to sell his hardware business because he did not have and could not get quite enough working capital to ride out the economic depression which had been reflected in the low income from the trust investments.

Another child, to raise cash during the hard times, sold mineral rights on his farm, which turned out later to be truly valuable.

One of Grandfather's daughters was divorced. She never had any children and had to work much harder than would have been the case had she been given principal instead of income.

The other daughter was even less fortunate. She had a long and arduous illness. The will had not permitted any invasion of principal ("for fear of reducing tax savings"). Her hospital care was at public expense.

But Grandfather died happy because he saved taxes.

Every layman should seek the counsel of an expert in drafting his will. The foregoing tale is based on a case which could have been different if the client had spoken directly to the tax expert and considered the possibilities which occurred. Another form of will

permitting invasion of principal for the benefit of income beneficiaries and establishing "spray trusts" might have saved taxes and avoided the misfortunes some of the characters in this tall tale experienced.

For Good or Evil

Tragic indeed is the story of two men whom I met on an island in the Caribbean. In order to avoid United States income taxes they had moved to the island ten years before. They had given up their native land because they had been told they could save income taxes. One of them has since died and much of his estate was used to pay death taxes. All of his beneficiaries wish that Uncle Tom had stayed at home and had continued to use the talents which had earned him his fortune for continuing to improve his homeland. Instead his energies shrivelled up as he devoted them to the negative aim of avoiding taxes—of letting someone else carry his burden of supporting his country's defense and public works.

These stories are not unique. They are so obvious that the characters appear naïve indeed. But that is because the tales are told after the events. Before the lives had been lived, they did not seem so absurd. Perhaps each one would have ordered his affairs in the same way and come to the same decision irrespective of tax-saving motives.

Our plea is that we do not unwisely recommend tax savings at the cost of alternative gain of money or human values.

As Mr. Justice Frankfurter recently said of the lawyer:

> He is a counsellor. He is a trustee to the wise conduct of his client... I think it is one of the gravest shortcomings of lawyers in being content to give their clients merely the advice of whether this is or is not the law, this is or is not permitted, without making themselves the advisers or counsellors of clients in dealing with everyday events.[1]

We all know, however, that to render perfect counsel in many situations requires a perfect client.

I repeat, these are simple fables. We have avoided legalistic language to urge the use of common sense and simple talk in reminding clients of the possible consequence of placing too much emphasis on avoiding taxes.

Taxes are not bad if government is not bad, so long as the taxes are fairly apportioned and properly used. If clients wish to avoid taxes, let them endeavor more to see that the tax dollar is wisely spent.

We hardly need remind our clients that lawyers are not prophets. But—

Let us not endorse corporate mergers to save taxes where the mergers are not primarily justified on a purely business basis.

Let us not forgo transactions resulting in capital gains just to avoid the incident tax. The tax is payable only on a profit.

Moffett, Chicago

Anthony L. Michel was born in India of American parents. He is a graduate of Yale College and the Harvard Law School and was admitted to the Illinois Bar in 1929. He is a member of a large Chicago law firm.

Let us not prolong the power of "dead hands" just to save taxes, although sometimes this is advisable to encourage descendants to work and be frugal.

Let us not sell our birthrights for a mess of tax-free pottage.

Let us all, as taxpayers, minimize taxes by insisting on wiser appropriations of tax funds instead of exploiting unsound devices to avoid their payment.

1. *Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Alumni*, Harvard Law School (1960) at page 5.

Admissions to the Bar in 1958 and 1959: Has the Downward Trend Been Reversed?

Ye Editor has trouble writing a scintillating headnote about a drab statistical article. The few relevant stories, including Mark Twain's, have no place in a dignified gazette. The usually reliable source books are barren. The index of the great *Oxford Dictionary of Quotations* does not include the word "statistics". The word does have synonyms, but Roget's *Thesaurus* refuses to tell what they are.

In the usually helpful *World Almanac* for 1960 the word "lawyer" does not appear in the index, but you can obtain complete information about billiard records, leading American jockeys and even skin diving.

When in trouble, the sound procedure, as Jefferson said, is "to have recourse to fundamentals", that is to the dictionary.

Webster, as usual, is terse and to the point:
"Statistics n. 1. The science of the collection and classification of facts on the basis of relative number or occurrence as a ground for induction; systematic compilation of instances for the inference of general truths."

by Reginald Heber Smith • *of the Massachusetts Bar (Boston)*

THE ABSOLUTE decline in the number of admissions to the Bar has been reversed for the past three years, the turn coming in 1957, but in relation to population the decline has only been arrested. The essential figures are set out in Table I.

It is hard to realize that our population is increasing by about 2,000,000 souls a year. Thus, by June, 1960, the population had risen to 180,299,000 according to the U. S. Department of Commerce in its July, 1960, issue of *Survey of Current Business.*

The absolute increase of 301 in 1959 over 1958 is distributed among thirty states and the statistics are in Table II.

In eight states the trend in 1958 and 1959, when compared with prior years, is somewhat confusing as appears in Table III.

Eleven states seem to show a downward trend and the facts are in Table IV.

For the meticulous reader the jurisdictions in Tables II, III, and IV add to 49. Subtract District of Columbia and the listing is complete because neither Alaska nor Hawaii is included in any of those tables. That is because I do not have enough figures for earlier years to venture any comparative evaluations.

In every article about *admissions* to the Bar there is, necessarily, a technical defect but one which, happily enough, is of no statistical importance.

Admissions to the Bar can be granted only by a court of competent jurisdiction in whose presence the young man or woman takes the sacred oath of admission.

Some courts publish no figures on admissions. Some publish figures that are inaccurate or misleading. Thus, if the figures of admissions include lawyers moving into a state from another state the *total* number of lawyers in the United States is not increased.

The only reliable statistics we have tell us, state by state, how many passed the state bar examinations and how many were admitted on diploma.

All the figures in this article are based on the sum of those who passed the bar examinations plus those admitted on diploma.

For the statistical expert, one final exclusion should be confessed. I have not included those admitted under "an emergency rule". Probably this is a blind spot in my mind. It is a tem-

Reginald Heber Smith has practiced law in Boston since 1914. He is one of the pioneers of the Legal Aid movement in the United States and served as Director of the Survey of the Legal Profession. He was awarded the American Bar Association Medal in 1951.

porary phenomenon. Those who are most devoted to legal education considered this so-called "kindness to veterans" an injustice to the veterans themselves as well as to the public. Except for New York where seventy-seven were admitted under the "emergency rule" the figures for other states are unimportant: two in Kansas, fourteen in Oklahoma, one in Texas, one in Washington State.

It is essential in a democracy that the professional services of lawyers should be available to every citizen, every alien, every business enterprise, —to anyone in need.

Legal services, in the aggregate, amount to much more than many lawyers realize. The following figures which come from the U. S. Department of Commerce *Survey of Current Business* for July, 1960, show that clients have paid lawyers for legal services as follows:

Year	Amount Paid by Clients
1956	$1,965,000,000
1957	$2,115,000,000
1958	$2,192,000,000
1959	$2,351,000,000

Table I

Year	Total Students In Law School	Total Number Admitted to Bar	Population	Admissions per Million
1949	56,102	13,344	150,000,000	89
1950	51,695	13,641	152,000,000	89
1951	46,037	13,141	154,000,000	85
1952	44,981	11,900	157,000,000	76
1953	42,548	10,976	159,000,000	69
1954	42,762	9,928	161,000,000	62
1955	40,158	9,587	164,000,000	58
1956	41,907	9,450	167,000,000	57
1957	41,500	9,592	172,500,000	55
1958	41,067	10,465	175,400,000	60
1959	42,540	10,766	178,300,000	60

(Population for 1959 includes Alaska and Hawaii and also the admissions from those states.)

Table II

State	1957	1958	1959	State	1957	1958	1959
Arizona	85	95	124	New Jersey	180	201	321
California	794	927	965	New Mexico	32	44	53
Colorado	123	152	158	New York	1662	1868	1940
Delaware	12	13	22	North Dakota	30	25	49
Idaho	17	19	25	Oklahoma	149	124	154
Indiana	116	141	163	Oregon	89	105	108
Kansas	146	109	197	Pennsylvania	348	365	444
Kentucky	72	85	94	South Carolina	26	68	72
Louisiana	152	210	213	Texas	528	486	544
Maine	24	23	30	Utah	43	45	57
Maryland	214	225	241	Vermont	13	11	14
Michigan	317	296	346	Virginia	162	260	245
Minnesota	199	181	230	West Virginia	48	45	54
Missouri	216	231	230	Wisconsin	199	214	221
Nevada	11	22	26	Wyoming	20	24	25

Table III

State	1957	1958	1959	
Arkansas	41	24	33	
Connecticut	134	170	195	(207 in '56)
District of Columbia	399	423	368	(444 in '56)
Massachusetts	428	344	427	
Nebraska	72	60	68	
Ohio	526	462	497	
South Dakota	25	21	24	
Tennessee	137	136	139	

Table IV

State	1957	1958	1959	State	1957	1958	1959
Alabama	115	82	94	Montana	31	29	21
Florida	332	439	326	New Hampshire	21	28	11
Georgia	79	176	130	North Carolina	119	125	117
Illinois	567	705	603	Rhode Island	35	35	33
Iowa	88	159	140	Washington	117	139	108
Mississippi	39	73	35				

Table V

	1956	1957	1958	1959
Compensation of Employees	$459,000,000	$496,000,000	$543,000,000	$601,000,000
Number of Full-Time Employees	126,000	127,000	134,000	142,000
Number of Persons Engaged in Production	256,000	258,000	265,000	274,000

Other relevant figures are shown in Table V.

A final figure, which has been very hard to obtain, deals with the number of lawyers who have departed this life.

As younger men and women are admitted to the Bar, older lawyers die.

The best evidence I have found comes from Martindale-Hubbell. If a lawyer who is listed in the 1959 edition of its Law Directory dies in 1959 his name must be deleted from the 1960 edition. The Company does everything in its power to obtain prompt reports of deaths.

This reliable evidence tells us that 3,026 lawyers died in 1959. Since complete coverage of every town and hamlet is almost impossible, it is probable that the total is somewhat larger. And, as the average age of lawyers increases, so must the death toll increase.

After we have these records for a few more years we can begin to compute the *net* increase in the legal profession.

There is a reawakening of a healthy interest in the question of "overcrowding". My first article, "The Bar Is Not Overcrowded" in the November, 1958, issue of the *American Bar Association Journal*[1] has evoked vigorous letters to the editor expressing dissent.[2]

It is entirely correct to assert that no one can prove or disprove "overcrowding" until we know how many lawyers the American people need. But I doubt if we shall ever know that figure. An author uses a catchword or phrase in the hope of attracting a reader or two.

These letters introduce a new factor (with which I have the greatest sympathy) into the equation, namely, the encroachments of unauthorized practice of the law. Thus, Mr. S. John Insalata of the Chicago Bar states:

> It is true that the *need* for legal services on the part of the general public is steadily increasing. It is also true that the number of lawyers in proportion to the remainder of the population has definitely decreased. But this does not mean that, therefore, the area of opportunity for the *average* young law graduate in private practice has also increased. For this is an era of "institutionalized law".

Mr. Raymond Reisler, of the Brooklyn Bar, who has done yeoman service in the battle against unauthorized practice writes:

> Unauthorized practice committees everywhere have found grave danger to a free and independent Bar in the ever diminishing legal work available to the average practitioner because of the inroads effected by . . . unlawful practice in numerous guises.

There may be another side to this question. It has been ably and forcibly expressed by Professor Charles W. Joiner of the University of Michigan School of Law under the arresting title "The Coming Deluge: How Goes Our Ark?"[3] published in 1957.

Two of his conclusions are:

> The number of persons who will desire to study law will more than double during the next fifteen years.
>
> Society will then need many more lawyers than at present. To meet this need graduating classes must increase by more than fifty per cent in fifteen years.

He prophesied that our 1960 population would be "179 million" and he was 100 per cent right.

"How Goes Our Ark?" Well, Professor Joiner believes that in 1960 "the number of applicants for admission to the law schools [will have] increased by 21 per cent of 1955."

We do not have the 1960 figures. *But through 1959 the increase from 1955 has only been 5 per cent.*

We are dealing with vital issues. It is our responsibility to see that the American people in the years ahead have their increasing need for legal services efficiently and economically taken care of by an adequate number of lawyers who are *both* well educated and well organized.

Dr. Vannevar Bush, who directed the Manhattan District project that produced the atomic bomb, asserts in "Modern Arms and Free Men"[4]

> The most effective progress in the [armament] race will not come from throwing all of the country's resources directly into the making of the weapons of war. In fact, that could be a sure way of losing in the long run.
>
> We must have a healthy people. We must raise our standard of living. . . *We must establish justice* and good will among our people . . .
>
> The judiciary . . . shape our path in the maze of law. They interpret the Constitution as the scene shifts and protect us against the rigidity that might otherwise bind our sinews . . . *The extent to which we escape rigidity without becoming confused depends upon the skill with which they perform their function* [italics mine].

The great scientist does not mention lawyers by name. That is unnecessary because we remember what Mr. Justice Miller, speaking for the Supreme Court, said in *Ex Parte Garland*:[5]

> It is believed that no civilization of modern times has been without a class of men intimately connected with the court, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import. They are as essential to the successful workings of the court as the clerks, sheriffs, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

Precisely the same definition of the function of the lawyer was expressed by the great Dean John H. Wigmore when he wrote:[6]

> He is a necessary part of the State's function of doing justice. In the part he plays, he is as essential as the judge.

1. 42 A.B.A.J. 1054.
2. 45 A.B.A.J. 661, 662, 906.
3. 9 Jour. of Leg. Ed. 466 (1957).
4. Simon and Schuster, New York, 1949, pages 128, 215.
5. 4 Wall. 333, 384.
6. Carter, Ethics of the Legal Profession xxii.

Statistical Note as to Table I. The figures for law school registrations here given are lower from 1956 on because I have deducted those registered at the University of Puerto Rico Law School. This is necessary because Puerto Rico figures are excluded from admissions and population.

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EDITORIAL OFFICES

1155 East 60th Street.....Chicago 37, Ill.

Integer Vitae

In 1940 the American Bar Association awarded its Medal to Roscoe Pound who, at the age of threescore and ten, had contributed a life span of brilliant service to the law. Today we ask him to pause in his continuation of that service long enough to accept the thanks of the profession for twenty years more of it.

The world is blessed by that provision of nature that so often lodges great intellectual vigor in the same vessel with great physical vigor. The same kind of strong physique that carried the incomparable Holmes through so many years of the intolerable labor of thought was given Dean Pound and with it his phenomenal mental equipment. No dweller in an ivory tower is he, though. Like Antaeus he renews his strength by touching the earth. Indeed his earthy self is almost as precious to us as his scholarly aspect and even more endearing. Some of us look back with glee to the unwillingness of the lawyers at a Texas bar meeting to believe that this man who had taken their money at poker was really the Dean of the Harvard Law School in effete Massachusetts. Others delight in the recollection of roaring out the chorus of "Oh, Lazuram!" as he, with great precision and solemnity, chanted the verses.

It was the young Roscoe Pound who, with a great speech, jarred the American legal world out of its complacency and started the waves of reform in the administration of justice which have ever since been freshening the stagnant calm of legal Bourbonism. It is his prodigious learning, though, that is the despair of other scholars. The flights of his legal philosophy take him into empyrean but, just as the earth refreshes him for those flights, so they seem to send him back to earth avid for the grass roots of the field of law. The vast bulk of the work of our courts, personal injury litigation, is despised by the silk-stocking members of our profession and deprecated by those who regard personal injuries as a social problem rather than a legal one, but Dean Pound turns, without the slightest strain, from Del Vecchio and Puffendorf to the affairs of the association of lawyers who represent the plaintiffs in these personal injury suits.

It is given Roscoe Pound to see life and law whole. May he continue to do so many years.

Does Local Prejudice Still Justify Federal Court Jurisdiction?

There is a large body of journeyman lawyers grinding out the day-to-day product of the courts who express the view that if the time spent by lawyers and judges on ways to shorten trials and avoid trials and generally revolutionize practice were spent in the actual disposition of court business, we would be nearer current at the end of the year. Whether or not there is any basis for such a view, there is an undoubted danger that reform will be accepted for reform's sake. The attitude of one who would raise his voice among the more fanatical apostles of progress to suggest that restriction of the jurisdiction of the federal courts would not be an unmixed blessing would be branded by them as Bourbon in the uncomplimentary sense. Yet all that we do when we bar the doors of the federal courts to cases is to send them to the state courts. The least that we should do when we throw this new burden on the state courts would be to postpone the effective date of the reform until the states will have had time to install the necessary new judges and facilities.

Nor is there complete foundation for the statement that the diversity jurisdiction is outmoded.

There are ways not contemplated by the founding fathers in which the diversity jurisdiction makes for determination of partisan questions in an atmosphere of impartiality. Labor litigation is now a large part of the business of the courts. Elected judges, such as most of the state court judges are, owe their positions to the voters. The members of the labor unions are, in the vast majority, persons trained in manual rather than mental skills. Inevitably a decision against a labor union is, to their minds, a decision against labor. A judge who must look to the members of labor unions for re-election would be more than human if

that fact did not tend to make him lean either forwards or backwards in a labor case. Also the jurors in the federal courts are selected from the whole district, often comprising an entire state, while in the state courts they are usually chosen from the county where the court sits. The labor cases brought in the state courts are usually brought in the larger cities where the labor union membership is concentrated. Again it is too much to expect of labor union artisans who are jurors to be objective when the issue seems to be whether the decision shall be for or against labor.

Though the right of an employer to bring labor litigation in the federal courts under the diversity jurisdiction depends on blind chance rather than on the result of deliberate policy it is a valuable right. It has been already curtailed by the act of July 25, 1958, 28 U.S.C. §1332(c), which treats a corporation as a citizen of the state where it has its principal place of business as well as of the state of its incorporation.

There is no constitutional impediment to broadening the jurisdiction of the federal courts in labor cases. Section 102 of the Labor-Management Reporting and Disclosure Act extends federal court jurisdiction to suits against labor unions and others based on infringement of rights given by that Act. Section 301(a) of the Labor-Management Relations Act of 1947 provides for jurisdiction in suits for violation of labor contracts without regard to citizenship of the parties. Congress has made a courageous beginning toward dispassionate consideration of labor disputes in the federal courts. No doctrinaire sentiment for curtailment of the jurisdiction of the federal courts should be permitted to thwart this movement.

Editor to Readers

The American Bar Foundation has prepared a thoroughgoing study of federal limitations on attorneys' fees. The study, which is part of the Foundation's general research into the economics of legal services, will be available in the near future. Meanwhile, it may be of interest to lawyers that the Social Security Administration recently has put into effect amendments to its regulations pertaining to the fees that lawyers may charge claimants for representation before the Administration.

A communication from the Bureau of Old-Age and Survivors Insurance to the Foundation states:

> The implementing regulations provide in general terms that a claimant's representative may charge such fee as may be approved by the Social Security Administration, except that if any of the services were rendered in connection with a proceeding before any State or Federal court, those services are not subject to regulation by the Secretary of Health, Education, and Welfare, and provided further, that under the regulations as most recently amended, (see Federal Register, Volume 25, dated February 26, 1960, pages 1684-1685), no approval is required if an attorney's fee does not exceed $20 for representation before the Bureau of Old-Age and Survivors Insurance only; $30 before a hearing examiner and/or the Appeals Council only; or $50 before the Bureau and a hearing examiner and/or the Appeals Council. Representatives other than attorneys are required to obtain approval before charging a fee in any amount.

The Bureau appears to take the position that the great majority of routine claims under old-age and survivors insurance are allowed without any real need for technical advice or assistance. In the small proportion of cases where counsel is employed, the attorney may petition for a fee higher than that permitted. The petition should include (1) the amount of the fee he wishes to charge, (2) a detailed and itemized description of each service rendered, (3) the time spent on each item, and (4) an itemized list of expenses, other than normal office expenses, incurred in connection with his services.

Shakespeare Cross-Examination

Whodunit?

Was it Christopher Marlowe?

The Earl of Oxford?

Sir Francis Bacon?

Or could it have been William Shakespeare after all?

The argument about who wrote *Hamlet, The Tempest, All's Well that Ends Well,* etc., etc., etc., has been thoroughly explored in the pages of the *Journal* for the past two years. Many of our readers have suggested that the series be published in book form.

If you are interested, there is a convenient coupon for you to fill out on page 1262 of this issue.

Constitutional Rights in Juvenile Court

"Many juvenile courts are still juvenile courts in name only; they are permeated by the philosophy of criminal law and criminal prosecution..." These words from a recent report by a subcommittee of the Senate Committee on the Judiciary might well serve as a text for Judge Alexander's article, in which he defends the juvenile court concept, as contrasted with the juvenile courts themselves as they exist in some jurisdictions.

by Paul W. Alexander • ***Judge of the Court of Common Pleas of Lucas County, Ohio***

THE JUVENILE COURT movement has just managed to weather one more decade, its sixth. But it did not come through unscathed. In fact, some of us who work in juvenile courts have spoken of the decade just past as the fearful fifties. The slings and arrows which came the way of the courts seemed not only more copious but sometimes more harsh than ever before.[1]

Many of the criticisms were helpful and understanding; quite a few shafts hit where it hurt. One rather common characteristic was noticeable: there was a tendency to damn the philosophy, the whole idea, because in so many courts it appeared to be working imperfectly. Certainly in many of them it was not working well; in some not at all; in many it was not even tried. All writers were heartily in favor of a fair trial for the juvenile delinquent; few said anything about a fair trial for the juvenile court.[2]

More than one writer pointed out that trouble might be expected from trying to serve two criteria at once: protection of the public and the best interest of the child. None made it clear that there is no incompatibility where the court is fully equipped to obtain all necessary diagnostic information about the child, plus adequate personal and scientific resources to treat him. Almost all assumed that juveniles ordinarily deny involvement in the offense charged, and that the court hearing must therefore be an adversary proceeding with the child denying and the state asserting his "guilt".

The Child's Constitutional Rights

It was in the area of the child's constitutional rights that the decade brought to light a minor but interesting revolt on the part of some highly distinguished judges against certain unorthodox juvenile court practices. So repellent were some of these practices that the judges were moved to repudiate the widely held majority rule that a delinquency hearing in juvenile court is a civil and not a criminal action, so that the customary impedimenta of a criminal action, while possibly desirable, are not always absolutely essential.

This doctrine appears to have become so distasteful to a California Appellate Court that the following language appears in the opinion:[3]

> While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge

1. Witness, in addition to some appellate reports, captions such as: *Juvenile Justice; Treatment or Travesty?* U. PITTS. L. REV.; *Juveniles Being Denied Basic Rights,* HARV. LAW RECORD; *What Nobody Knows About Juvenile Delinquency,* HARPER'S; *The Crisis in Our Juvenile Courts,* CORONET and others, reminiscent of the classic, *Juvenile Courts—Abolish Them,* CALIF. B. J.

2. Typical of some of the criticisms are the following random excerpts from Report No. 130 of the Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary, commonly known as the Kefauver Committee: "There was always the cry of a lack of adequate probation officers; an utter lack of detention facilities other than the local jail . . . judges who were appallingly not qualified for their work and who failed to understand the fundamental principles of the juvenile court; unnecessary publicity of hearings, many times for political reasons. This condition was found to exist not only in the courts in the less populated areas but in some courts in urban areas where very little development has taken place away from the criminal court origins out of which they have chiefly sprung . . . we find that a great many children's courts are distinct from the ordinary court system only in having separate hearings, and that in fact the judge and other personnel are engaged in criminal, civil or other types of legal activity the majority of the time. Many times there is a transference in method and attitude from the criminal court to the juvenile court on the part of the judge. . . Children's cases are handled much like any other criminal cases except that they many times fail to provide the protections that prevail in criminal courts and are considered basic ingredients of justice. . . . Many juvenile courts are still juvenile courts in name only; they are permeated by the philosophy of criminal law and criminal prosecution; they lack adequate staffs, decent detention quarters, study and classification centers and diversified placement facilities; they are handicapped by meager financial appropriations, causing excessive caseloads and the appointment of unqualified personnel. . .

"As to the constitutionality of juvenile court proceedings—this is one of the major areas that the members of the delinquency subcommittee wished to look into. During its investigations, the omniscient attitude of some juvenile court judges coupled with arbitrary, obviously uncalled for decisions, made some of the subcommittee members with socio-legal backgrounds wince with pain. The rights to a definite charge, counsel, a fair hearing, reasonably relevant and convincing evidence and appeal, which are ensured on even the most trivial issues to adults, were not being afforded to children. . .

"A well-functioning juvenile court system living up to generally recognized but frequently unrealized standards would be the best defense against attacks on the juvenile court."

3. *In re Contreras,* 109 Cal. App. 787; 241 P. 2d 631, 633 (1952).

to credulity and doing violence to reason.

From coast to coast the unrest spread. Before long we find a judge of the District Court of the District of Columbia saying:[4]

> Yet by some sort of rationalization under the guise of protective measures, we have reached a point where rights once held by a juvenile are no longer his... has the Congress wiped out the constitutional protection by changing a name, the substance remaining the same? This Court stands steadfast in the belief that the Federal Constitution, in so far as it is applicable "cannot be nullified by a mere nomenclature, the evil or the thing itself remaining the same."

Soon another very learned judge of the same court, while following the same line of thought, laid down a fresh criterion that in its delightful simplicity bid fair to settle all confusion and resolve all doubts:[5]

> Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy, as is the case with the right to counsel and the privilege against self-incrimination, is applicable to all proceedings irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of liberty of the person. Necessarily, therefore, this is true of proceedings in the juvenile court. Previous constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be in the nature and the essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.

It was just six months later that the U. S. Court of Appeals of the District of Columbia Circuit, by Chief Judge Prettyman, was calling attention to abuses of the Bill of Rights by trying to stretch it to cover matters it was never intended to apply to:[6]

> But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be and often are expanded by rhetorical inflation beyond all semblance to the realities with which they were meant to deal.[7]

Of late we have been witnessing a movement, perhaps unconscious, to expand several rights beyond the "simple, succinct phrases" of the Fifth and Sixth Amendments, to wit, from criminal prosecutions to juvenile court hearings; from these to any proceeding where liberty is threatened. Superficially this appears laudable enough and at least harmless. But the hard "realities" of everyday life in the juvenile court have shown that this expansionist movement is hardly an unmixed blessing.

What were the realities, to borrow Judge Prettyman's words, with which these constitutional protections were intended to deal? A short answer is that much of the Bill of Rights was essentially designed to deal with adversary proceedings in criminal courts and consequently does not readily fit into the picture of the juvenile courts.

The framers of our Bill of Rights, with all their learning and wisdom, were familiar with only one type of litigation, the traditional adversary type. They could hardly have intended the bill to apply in a hitherto unheard of type of court designed to eliminate the ancient, accusatory, prosecutive, punitive approach; to depose the state from its aggressive, hostile role; and to substitute a non-adversary, non-punitive, solicitous approach aimed to protect and correct the child malefactor—protect him from evils likely to be met in the criminal process and prison, perhaps in his own home and neighborhood; and correct his malevolent attitudes by diagnosing and removing or rectifying as far as possible the causal factors through application of social sciences, such as medicine, psychology, psychiatry, counseling, education, social casework; and most of all through benevolent personal contact—in short, not to fight the delinquent but to fight delinquency, and not with a legal bludgeon, but with knowledge, science, skill and devotion.

Juvenile Courts May Be Step-Children

But, one wonders, if juvenile courts are supposed to be so high-minded, how come so many of them tend to cheat children out of constitutional rights? There are several explanatory factors. First of all, in perhaps 90 per cent of our communities juvenile jurisdiction is a step-child in the jurisprudential milieu—an afterthought foisted upon some older court, probate for example, where the judge may feel too heavily laden with his "regular" work to take necessary interest in juvenile matters. This makes it easy for the so-called juvenile court to revert to a junior criminal court—and natural for reviewing courts to regard it as such.

Secondly, an incredible number of so-called juvenile courts have never become true juvenile courts because their respective communities have kept refusing to provide them with funds for the necessary tools to work with, sufficient hearing officers, trained personnel, scientific clinics, proper quarters, adequate correctional schools and facilities, and other vital resources. As an experienced administrator, now District Court Judge Luther Youngdahl, says:[8]

> ...The public must be aroused to the importance of providing juvenile courts where none now exist, and furnishing these courts with the trained help, psychiatrists and probation officers they must have. It is good economy. It is humane. And it will decrease delinquency.

Lacking these, the juvenile judge has two alternatives: (1) release the delinquent on pseudo-probation which may simply amount to turning him loose to commit new offenses; (2) cage him, much as we cage wild animals. One who has never experienced it can have little idea of the torment that afflicts a conscientious judge when he faces a

4. *In re Poff*, 135 F. Supp. 224, 226 (1955).

5. *U. S.* v. *Dickerson*, 168 F. Supp. 899, 901 (1958).

6. *Worthy* v. *Herter*, 270 F. 2d 905, 907 (1959).

7. While Judge Prettyman's fascinating opinion makes no reference to specific areas of expansion, a number of instances come readily to mind, *e.g.*, freedom of the press has been expanded to the public's right to know; the accused's right to a public trial has been expanded to include the public's right to a public trial; his right to counsel has been expanded to impose an affirmative duty upon the state to tell him about it and perhaps furnish him one; his right against self-incrimination has been exposed to so much rhetorical inflation that he is a wise lawyer, indeed, who knows for sure just how to advise a client on the witness stand.

But one need not be precocious to perceive through all this expansionist effort a crippling effect on certain other rights. Inevitably the new "people's right to know" and the new "public's right to a public trial" must be had at the expense of another principle, that which undergirds the Fourth Amendment, to wit, "the people's right to privacy".

8. Coronet, October 1957, page 76.

wrong-headed boy and knows the best way to help him head aright but, for lack of adequate personnel and resources, is forced to condemn him to the doom of an almost certain criminal career.

Thirdly, some courts have been afflicted with judges personally unwilling to accept and apply the new juvenile court philosophy because they were too steeped in the old routines of traditional adversary litigation to undertake anything so new-fangled. Besides, it's so much easier, more courageous, more righteous, to yield to pressures of press and popular clamor and crack down on the lawless, hapless hoodlum. He behaved like a criminal, didn't he? Then why not treat him like a criminal!

Little wonder that courts like these come to be regarded as junior criminal courts for youthful law-breakers. Furthermore, their criminalistic approach is bound to encourage a larger proportion of children to deny involvement. More denials mean more trials to determine innocence or guilt, more records that reek with criminal trial appurtenances. These lead to more appeals for denial of constitutional rights. In fact, not a few such appeals have originated in one court which some years ago was investigated by a committee which found it then resembled a typical criminal court in twenty-one respects. Altogether there are disgracefully large areas, practically whole states, where the juvenile courts are such in name only.

Very little criticism is directed at the appellate decisions. Not enough is aimed at the conditions that give rise to so many appeals. When appeals arrive fraught with criminal indicia it would not be strange for the judges to regard them as having originated in a criminal court and to apply the rules of criminal law. If there must be a whipping-boy let the local communities accept their share of the blame, for each community must stand responsible for the kind of a court it tolerates.

Nor is it strange that some lay and legal writers should take a dim view of the whole juvenile court movement, especially if they draw their inferences not from experience or observation but from what they have heard and what they have read in appellate reports reviewing our renegade juvenile courts. In this respect they remind one of the blind men and the elephant. They judge the whole by the part with which they have come in contact. They are blind to the existence of some comparatively standard courts which in a cumulative total of thousands of years of experience have tested and proved the validity of the juvenile court thesis; courts from which in hundreds of thousands of cases not a single appeal or habeas corpus proceeding has been taken based on a finding of delinquency; courts which in no whit resemble a criminal court and which it would be tragic to force back into the role of a criminal court; courts which cheerfully observe the amenities of the Bill of Rights when occasion arises, regardless of whether its provisions are technically applicable.

But occasion to observe the Bill of Rights is a rare occurrence in such courts because by adopting the solicitous, non-accusatory approach they avoid the adversary atmosphere and leave little need for the Bill of Rights' protections. An estimated 99 per cent of the children brought to them for delinquency admit involvement in the offense named often tearfully, sometimes cheerfully, sometimes boastfully. In one court a count of 3,000 consecutive cases over a two-year period revealed that only five children had wholly denied involvement in the named offenses. In those rare instances where a child does deny involvement an adversary trial is easily arranged.

Experience has shown that mischief may be done by strict insistence upon all the safeguards of the Constitution. This was recognized by Senator Hennings of Missouri, in a preview of the report of the Subcommittee To Investigate Juvenile Delinquency:[9]

> It has been said that to emphasize due process might result in increasing formality in court procedures. For example, to suggest the right to counsel to juveniles many times may result in lengthy jury trials. The end result has been described as a "miniature criminal court".

Surely lawyers must know that the very first purpose of the Chicago Bar in establishing the juvenile court was to get children out of the criminal court, away from its atmosphere and concomitants. But nobody wanted and nobody now wants to detract one iota from any child's existing rights. As mentioned in the *Poff*[10] and *Shioutakon*[11] cases, it was the intention of the juvenile court founders not to subtract but to add. These men and women were concerned with recognizing and implementing children's rights over, above and beyond the Constitution and the law: their social, moral, mental, physical, economic, ethical and all their natural rights.[12]

Here's why all this is important. Criminal courts exist to convict and dispose of guilty adults. Juvenile courts exist to protect and correct delinquent children. Whenever the juvenile court must also convict, it is in danger of defeating its main purpose. To help the child change his attitude, a clean breast, a confession, is a primary prerequisite, a *sine qua non*. Otherwise the court

Garrison Studio

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9. FEDERAL PROBATION, June, 1959, page 7.
10. *In re Poff*, *supra*, Note 4.
11. *Shioutakon* v. *U. S.*, 236 F. 2d, 666; 60 ALR 2d 686.
12. *E.g.*, "In the State of Ohio every child is entitled, as a minimum, to have two parents living together in reasonable harmony with the child and with each other." *In re Douglas*, Syl. 1, 82 O.L. Abs. 170, (1959).

would be aiding the child to build his future on a foundation of falsehood and deceit, to build his house on sand instead of the rock of truth and honesty. Of course, if the child happens to be innocent, the court must step out of the case. If he happens not to be, but despite the evidence maintains his innocence, the court might as well step out. That's what end results generally indicate. Yet, while a confession is thus of consummate importance, it must by all means be voluntary if the court is to be helpful, not merely punitive. Every competent court worker knows that to "wring a confession" from a child is both unfair and unavailing.

Consequently anything that may tend to discourage a child from making a clean breast of it, that may tend to encourage him to try to escape the consequences of his actions by denial or otherwise, must retard and is likely to defeat the court's efforts to correct the child.

It is commonly assumed, especially by the legal profession, that a child in juvenile court for delinquency ought to have a lawyer. Certainly this is a valid assumption in all cases where there is a dispute of material fact or a question of law; likewise in all courts where the judge perforce or by choice operates a junior criminal court. But it must be remembered that in the standard courts the question is almost never "did he or didn't he?" but "what is the best way to change his wrong attitude and correct his unlawful behavior?"—a province where the answers are hardly the private preserve of the legal profession.

In *Shioutakon*[13] it is affirmed that the effective assistance of counsel is so basic that it virtually may be read into the statute. In "the realities", whether it is the great boon the legal profession insists it is depends almost entirely on the lawyer. Good lawyers, competent men and women with a social conscience, are unquestionably of tremendous value to child and family. Their honesty and intelligence generally enable them to see matters in true perspective and employ their wisdom to advise their clients to seek what is best for the child in the long run, rather than attempt to win a Pyrrhic victory and obtain for their clients what they want but perhaps shouldn't have. That makes such lawyers twice blest in any juvenile or family court: they are an unqualified blessing to the child and parents; moreover, whenever retained because of the clients' confidence in them, they assist court as well as client in helping devise and carry out the best plan for the child's future.

Freeing Delinquent Is Not Fair Treatment

But when a lawyer appears who possesses no social conscience or is constitutionally contentious or vainly legalistic or mentally myopic, he seems impelled to earn his fee by putting on a show for his client. He must win his case by hook or crook, "spring" the kid, get for his clients what they want regardless of ultimate consequences to child or family. There being as a rule no counsel to oppose him, he frequently succeeds—but to what end? So the child can further pursue his delinquent ways? So next time he will know better how to escape detection? How better to "beat the rap"? To correct a defiant, disturbed delinquent is at best a difficult, delicate process. To insist on such a legal bull in a china shop is surely dubious due process. How can it be fair treatment?

The late Judge Schramm of the Pittsburgh Juvenile Court shortly before his untimely death in 1959 was telling a group of judges of a case where, after listening patiently to a boy's efforts to explain away a delinquency charge, he finally said to the boy: "But Sonny, what you have been telling me just doesn't make sense." "Well, that's what *he* told me to say", replied the boy, pointing to his attorney.

The first purpose of a hearing is to learn the truth. Which is the greater justice to the child: to teach him honesty and encourage him to *reveal* the truth or to pave the way for him to lie and *conceal* the truth? Doctors diagnose and treat a child whose body is sick. The child is never encouraged to deceive the doctor or to evade his questions. Must there be a different ethic when a child's behavior is sick?

We lawyers are taught to look upon the protections of the Bill of Rights as a basic ingredient of justice as commonly conceived. Of course we all applaud justice as a noble concept. But in criminal court stark justice, for all its virtues, is an arid, cold concept. There naked justice is hard, barren, uninviting to many. Such justice can be cruel. It appeals mainly to the vindictive. That is because it is punitive. We administer it by punishing the guilty. To punish means to hurt; to inflict pain. The words pain, punch, penalty come from the same root as punish. Frankly, justice is unattractive to many clients of juvenile court. Parents seldom want justice for their children. It may be all right for other people's children, but not for their own; nor for themselves. If all we want is simply justice it could just as well be meted out to children in any conventional court. The juvenile court was not created to administer justice to children. It was meant to go very much farther than that. Its efforts were meant to safeguard those supra-constitutional rights mentioned above.

This does not mean the juvenile court may ever be unjust to children. There is surely no apology to be made for any judge or court worker who deliberately, impatiently or ignorantly cheats any child out of any constitutional right. But the really alarming danger is that a person who would do such a thing is likely to be the kind of a person who would cheat the child out of his supra-constitutional rights. That is an ever-present temptation. For the latter rights are less well defined and far more difficult to administer.

The ultimate worth of constitutional rights has been firmly upheld in the most recent decisions to date—but without the slightest disparagement thereof, these rights have been put back where they belong: in criminal prosecutions in criminal court. Efforts to expand them (by rhetorical inflation or otherwise) to cover juvenile court proceedings would seem to have been retarded, to say the least, by the decision in *Pee* v. *United States*.[14]

Chief Judge Prettyman, after a brief but effective exposition of juvenile court philosophy and a lucid description of its legal procedures, says:

13. *Supra*, Note 11.
14. 274 F. 2d 556 (D.C. Cir., 1959).

> The foregoing proceedings are not criminal cases. The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment (citing Shioutakon) and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases. So far as we can ascertain, with few exceptions in a multitude of cases, this has been the ruling of the courts. By the same token the Federal Rules of Criminal Procedure do not apply to these proceedings.

Judge Prettyman appends a note citing cases from forty-three states and the District of Columbia supporting the thesis that juvenile proceedings are not criminal.

Still more recently the District Municipal Court of Appeals, in the *McDonald*[15] case by Chief Judge Rover, cited the *Pee* case, and called attention to the fact that:

> The appellate courts of this jurisdiction have with complete approbation upheld the underlying philosophy of the [Juvenile Court] Act and adhered to the rule that the proceeding is not a criminal action.

McDonald answered the animadversions of *Poff*[16] and *Dickerson*[17] in these words:

> Thus, the 1938 Juvenile Court Act did not simply provide for the same kind of a trial as its criminal predecessor did under a new label

and held that:

> the constitutional rights granted to persons accused of crime are not available to minors in a juvenile proceeding.

Finally, the U. S. Court of Appeals has reversed *Dickerson*.[18] The District Court had ruled constitutional safeguards applicable in juvenile court; that as the child might have lost his liberty therein, the proceeding was essentially criminal regardless of nomenclature; so, when the child was waived to the District Court, the doctrine of double jeopardy applied. In the reversing opinion, Bastian, J., Miller and Bazelon, JJ., concurring, said:

> The District Court relied on some early state cases... But those cases throw little light on the issues before us. They are traditional criminal proceedings, which are essentially accusatory, adversary and punitive. Consequently, they involve considerations which are not relevant to the noncriminal *parens patriae* proceedings of the Juvenile Court.

These trenchant last words leave little more to be said. In our American culture there are now four institutions, each charged with certain distinctive responsibilities in the upbringing of children in the way they should go. They are home, church, school and juvenile court, the latter said by Roscoe Pound to be the greatest forward step in Anglo-American jurisprudence since Magna Charta! To deny the juvenile court a fair trial is to deny the child himself a fair trial. To deprive the court of its rightful status, to impair its potential effectiveness is to deprive the child of not merely constitutional rights, but of many invaluable rights regarded as the birthright of every American child. It is like denying a sick child the right to a good hospital.

The moment we insist upon affording children, whether in home, school, civic and legal matters, or court, all constitutional liberties, rights and safeguards afforded to adults, we open the door to a number of undesirable, potentially dangerous factors; so that, instead of protecting the child, as is our honest intention, we may be doing him a disservice, an injustice. Injustice to a child should be unforgivable, unthinkable. Justice to a child must be more than due process of law and fair legal treatment. No abstract right can be as sacred as a human child.

15. *In the Matter of McDonald*, Municipal Court of Appeals for D.C., No. 2255, (August 6, 1959).
16. *Supra*, Note 4.
17. *Supra*, Note 5.
18. *Supra*, Note 5, quoted above. See *U. S. v. Dickerson*, U.S. Court of Appeals, D.C. Circuit, 271 F. 2d 487 (D.C. Cir. 1959).

Association Calendar

Annual Meetings

St. Louis, Missouri	August 7-11, 1961
San Francisco, California	August 6-10, 1962

Board of Governors Meetings

Midyear Meeting, Chicago, Illinois	February 15-16, 1961
Board of Governors and Conference of Bar Presidents	February 17, 1961
Spring Meeting	May 15-16, 1961

Midyear Meeting

Edgewater Beach Hotel, Chicago	February 15-21, 1961
Group Meetings	February 17, 18 and 19, 1961
House of Delegates	February 20-21, 1961

Regional Meetings

Houston, Texas	November 9-12, 1960
Indianapolis, Indiana	May 10-13, 1961
Birmingham, Alabama	November 9-11, 1961

Books for Lawyers

CORPORATION LAW AND PRACTICE. *By George D. Hornstein. St. Paul: West Publishing Co. 1959. $50.00. Two volumes. Pages xxx, 658 and xxiv, 724.*

This two-volume treatise on corporation law and practice is an outstanding contribution to the existing literature and should stand as a definitive authority in the corporation field.

The author is listed on the title page as a member of the New York Bar and as an Adjunct Professor of Law at New York University School of Law. Only one who both has actively engaged in corporate practice for a substantial period and has taught all phases of corporation law could possibly have written this work with its well-balanced combination of practical approach and insight and scholarly thoroughness. Corporate theories are given their due, but the emphasis throughout is on planning and drafting, with proper attention to corporate litigation.

In organizing the vast body of corporation law into an intelligible two-volume treatise, Mr. Hornstein's goal has been to "prick out" the current pattern of the case law and to cite illustrative precedents, noting minority holdings only where the conflict appears to be fundamental. Special attention is paid to the business corporation statutes of ten commercially important states, *viz.*, California, Delaware, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio and Pennsylvania, selected by reason of their standing in lists of new annual incorporations, lists of corporations by size of assets, listings on the New York Stock Exchange, and Securities and Exchange Commission registrations. By such standards, New York and Delaware are by far the two most significant jurisdictions. Throughout the text, especially in the checklists and forms, New York law is especially well treated. Also singled out for comprehensive discussion are Delaware law and the Model Business Corporation Act, which has served as a model for corporation law revision in a growing number of jurisdictions. Yet the text remains a national text, useful in all American jurisdictions, the only caveat being that it expressly does not purport to note local aberrations which may have influence in a particular jurisdiction.

The discussion is mainly chronological in sequence and is divided into three parts: (1) choice of the business form; (2) formation of the corporation; and (3) operation of the corporation. In this arrangement, separate treatment of the corporate financial structure is omitted, with the result that the discussion of corporate finance is scattered and telescoped. All-told there are thirty-six chapters and a total of 986 sections (of which, however, only 534 sections at present contain text since 452 sections are reserved for supplementary material). The final third of the second volume consists of a ninety-three-page table of cases (citing more than 3,350 cases in number), a forty-six-page table of statutes, and 114-page index.

The style is clear, interesting and concise; the analysis is scholarly but definite; the interpretations and conclusions suffer from little equivocation. Highlighting the practical approach are various checklists and forms. Many of these were prepared for use in New York, but obviously some jurisdiction had to be selected and New York is the most natural. While one might question the value of a particular form without the inclusion of alternative clauses of perhaps equal prevalence, the forms do give a practical tone to the text; unfortunately they add (by their some 170 pages) to the size and cost of the treatise.

Included in the discussion are five separate chapters on tax consequences. Chapter 3 deals with tax considerations in the choice of the business form; the text's final four chapters, 33-36, treat respectively tax impact on the corporation, tax impact on the shareholder, tax impact on the corporation's employee (including shareholder), and tax problems on change in business form. Most of the significant tax discussion, even of Subchapter S tax-option corporations which would seem worthy of greater emphasis in Chapter 3, thus is concentrated at the end of the text. Integration of the discussion of tax aspects in connection with the corporate transactions to which they relate would appear to this reviewer to have been a preferable approach to such compartmentalization of corporate tax aspects.

For more than twenty years, Mr. Hornstein has been a regular and valuable contributor to the periodical literature on corporation law, especially in the areas of shareholder derivative suits and the problems of the close corporation. In these areas, this treatise is especially outstanding. In contrast, his treatment of the impact of federal and state securities legislation and regulation is somewhat cursory (see Section 435) on the theory that full treatment is available elsewhere.

To keep the two volumes up-to-date, provision is made in each volume for pocket parts; some 452 section numbers are reserved for supplementary material.

Every lawyer, whether corporate specialist or general practitioner, who has corporate problems should have access to Hornstein's treatise. It is the best "buy" available on corporation law and practice.

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THE SPIRITUAL HERITAGE OF JOHN FOSTER DULLES. *Philadelphia: The Westminster Press. 1960. $3.95.*

The life story of John Foster Dulles cannot yet be written. The man himself and the sorrow of his passing are too near for a full appraisal of his greatness, but it is entirely fitting that his

deep religious fervor and his militant faith, as expressed in his own writings, should be made known now to vivify the character of the man and the motivating power behind his devotion to his superhuman tasks as Secretary of State.

Only by reading from his articles and addresses, some of which are published under the guidance of Dr. Henry P. Van Dusen, President of Union Theological Seminary, can the readers realize that Mr. Dulles was one of the most dedicated men ever to fill the portfolio of the State Department.

People everywhere marvelled over his indefatigability and his innumerable journeys over the world, in times of emergency and otherwise, seemingly without rest or relaxation. Now, it is clear that the man was spurred and inspired by his Christian faith, which fed the consuming fire that made him an unfaltering emissary of the Prince of Peace.

Few men were ever more responsive, at any cost, to the inner voice of conscience. At times, Mr. Dulles seemed oblivious to the praise or censure around him. There must have been some impelling craving for the perfect synthesis of truth and action which alone could satisfy his test of ultimate success and his conception of life's purposes.

No more appropriate review of this book can be written than the introduction by Dr. Van Dusen, and little remains to be expressed here beyond the emphasis on John Foster Dulles' upbringing. His father was a Presbyterian minister and a teacher of theology, and Mr. Dulles was reared in a Christian atmosphere. The training of his boyhood, and the love of his family and country grew with increasing steadfastness throughout his distinguished career, and his legacy of faith is a shining example of the formative influence which every American family should emulate.

The selections in *The Spiritual Heritage of John Foster Dulles* contain, with discussions of some of the overreaching issues of the day, "five ringing convictions rooted in an uncompromising allegiance to God:—the reality and regnancy of moral law; the divine endowment of human beings as children of God; the practicality of the teachings of Jesus; the necessity for a righteous and dynamic faith; and the obligation to action—by their fruits shall they be known".

Here, for all, is a priceless inheritance of hope and strength!

WALTER CHANDLER

Memphis, Tennessee

AIRCRAFT MORTGAGE IN THE AMERICAS. *By S. A. Bayitch. Coral Gables: University of Miami Press. Distributed by Oceana Publications, Inc. New York. 1960. $4.75. Pages 159.*

The subtitle of this short book is "A Study in Comparative Aviation Law with Documents". The author's conclusion indicates that his principal aims are, first, to demonstrate that, despite differences in approach and in the details of the solutions worked out under the various legal systems, both common law and civil law, prevailing in the Americas, the law on this highly technical subject has developed in the same general direction in all countries; and second, to emphasize the shortcomings of the Convention on International Recognition of Rights in Aircraft (Geneva Convention). However, the book provides both a useful outline of matters to be considered by lawyers interested in creation or interpretation of mortgages on aircraft in any country in the Americas and a compilation of the statutory materials which deal directly with the subject.

Unfortunately, as the author points out, there has been little occasion to utilize the aircraft mortgage outside the United States. He has therefore been forced to rely almost entirely upon the statutory materials rather than upon actual cases or other experience. Because they are based on theory rather than experience, many of the statutory provisions evidence slight connection with reality. The reader is left to ponder on how they might work in practice in any particular country.

In Part I, the author first describes the types of security arrangements available in civil law and in common law countries, with a brief history of the development of *hipoteca* and *prenda* in the civil law. He then outlines the sources of law in the Latin American countries and in the United States and Canada. These opening chapters will be of particular interest to readers who are not familiar with civil law concepts. The author then proceeds to analyze the various statutory provisions relating to aircraft mortgage agreements, including those dealing with the agreement itself, the property which may constitute the security, the rank and privilege of various claims, and the enforcement and termination of the security arrangement. Finally, he deals with the international problems in connection with aircraft mortgages. These are of particular importance because aircraft can, and in practice often do, move speedily from one jurisdiction to another and are useless if immobilized. Aside from principles of general applicability and of conflict of law as to which there are certain special provisions dealing with interests in aircraft in some countries, the international law on the subject is found largely in the Geneva Convention, although the Montevideo Conventions and the Bustamante Code have some provisions which apply to it. The author's treatment of this aspect of the subject is largely an analysis of those Codes, with emphasis on the former. The Geneva Convention has been ratified by very few states, so that it provides little assistance in making effective an aircraft mortgage where the aircraft is engaged in international operations. The author attributes the lack of acceptance of the Convention to its being an attempt to do too much too soon, resulting in a compromise of legal wits rather than a design to serve practical needs. He suggests substantial revision of the Convention as well as greater use of bilateral treaties to improve the situation.

Part II, which comprises half of the book, is a compilation of statutory provisions applicable to aircraft mortgages, particularly of the aviation statutes of the various countries, with the statutes of Florida and Ontario governing chattel mortgages included by way of illustration of local statutes on this subject in the two common law countries in the Americas. The text of the Geneva Convention and applicable

provisions of the other conventions referred to are also included.

This study will provide a worthwhile evening's reading for any lawyer interested in foreign business transactions in the Americas, as well as for those interested in the specific subject.

JOHN C. PIRIE
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THE COMMON LAW TRADITION: DECIDING APPEALS. *By Karl N. Llewellyn. Boston: Little, Brown and Company. 1960. $8.50. Pages 565.*

By this book a master-student of our common law adjudicative processes has given the Bar and the Bench an invaluable tool. Of course, as the distinguished author points out, the material he has assembled, analyzed and made useful has been at hand. Perhaps so, but the material needed Llewellyn's insight and Llewellyn's faith to give it life.

Deciding Appeals, as one would expect of a Llewellyn publication, is rich food for the jurisprude, the law professor and the appellate judge. I make bold to suggest that this newcomer to our desks will take its proud place among those honored volumes of and about law that we term "works of significance".

But *Deciding Appeals* not only has long-range significance. It, more important, has timeless short-range practicality. It is a day-to-day storehouse of suggestion for every conscientious litigating lawyer and for every counselling lawyer who responsibly weighs litigation chances. The plagued advocate faced with the question of whether to appeal that oh-so-unjust decision finds here eminently practical guidelines by which to measure appellate predictability. Whether he is charged with briefing his first appeal or whether appearance before an appellate bench is second nature to him, any advocate who grasps the wisdom contained in this book will do a better job in marshalling his material for judicial consumption.

Here one finds effective treatment of factor after factor ("clusters of factors" as the author fitly calls them) that educate and steady the judicial mind and affect the judicial approach to case-resolution. There is a magnificent treatment of the way courts handle precedents. The knowledgeable lawyer will know how to **adapt** this chapter to his needs, case by case, so as to get the greatest mileage precedent-wise for his clients. For instance, there is a list, footnoted by case and by jurisdiction, showing forty-eight different ways that courts have dealt with precedents, both consistent and contradictory. And with convincing exposition and example we are shown how courts starting from old materials habitually weave those materials into new fabrics. The ways by which this is done are laid bare, pat for lawyer application. And there's a great deal more. Many means of advantageously using common law material in brief and in oral argument are set forth in prodigal profusion, as in the chapters provocatively entitled "Situation-Sense and Reason", "Reckonability of Result", and "Argument: The Art of Making Prophecy Come True".

Llewellyn's thesis is that our common law, a system of law grounded upon (and inspired by) a grand tradition of effectively meeting with fairness each new societal situation as it has appeared, is today in the hands of American appellate judges just as effective as it ever has been. In portions of the book and in the appendix, he demonstrates the validity of this affirmation by analyzing daily-grist cases decided on random decision days by the courts of last resort in fifteen of the states. He also demonstrates that this current effectiveness is a recapture, that from time to time our courts have lost situation-sense, and that we can again slip back into deciding cases other than by an intelligent use of common law reasoning. He points out that judging brings about a chaotic lack of appellate reckonability when courts rely upon the technical adjudicatory techniques always at hand, and approach decisions in new situations with an artificial attitude of "It's now the law, so what?"

In contradistinction, the author gives comfort in his discovery that the courts he has studied realize that the grand tradition of the common law compels appellate judges to attain an intellectual understanding of each new situation presented for judgment so that intelligent common-sense legal reasoning, consistent with the traditions of judgecraft, may be so applied to the determination of the new case that desirable growths are not hampered while the law does not become so unsettled as to make appellate results unpredictable.

What judge or lawyer would consciously want the law to develop otherwise? What judge or lawyer would consciously fail to avail himself of the learning this book contains?

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Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Appeals . . .
state procedural rules

Wolfe v. *North Carolina*, 364 U. S. 177, 4 L. ed. 2d 1650, 80 S. Ct. 1482, 28 Law Week 4459. (No. 7, decided June 27, 1960.) *On appeal from the Supreme Court of North Carolina. Dismissed.*

The appellants here tried unsuccessfully to assert that they were barred from using a golf course on publicly owned land because of racial discrimination. A technicality of state law prevented them from raising the issue in the North Carolina Supreme Court, and the Federal Supreme Court ruled that the North Carolina court's decision rested on adequate non-federal grounds.

The appellants were convicted of violating a North Carolina criminal trespass statute. Their defense was that they were denied use of the golf course solely because they were Negroes, and that the trespass statute, as applied to them, was therefore unconstitutional. The judge had charged the jury that the defendants could not be convicted if they had been excluded from the golf course because of their race. The jury returned a verdict of guilty.

Meanwhile, appellants had brought suit in the Federal District Court for an injunction forbidding the golf course operator from operating the course on a racially discriminatory basis. The court granted the injunction and its judgment was affirmed by the Court of Appeals for the Fourth Circuit. When the criminal trespass case reached the North Carolina Supreme Court, appellants contended that the findings of fact in the Federal District Court and its judgment conclusively established, contrary to the verdict of the jury, that the state statute was being used to enforce racial segregation.

The North Carolina Supreme Court affirmed the trespass convictions, however, stating that, while defendants could not be convicted if they had been excluded from the golf course because of their race, there was nothing in the record to justify a finding that this had happened. The court noted that the appellants had not offered in evidence the record in the federal case "for reasons best known to themselves". Before the Federal Supreme Court, the appellants explained that the federal court's findings were offered at the trial and were excluded, but that due to "some quirk of inadvertence" they had failed to include that part of the transcript when they went to the North Carolina high court.

Mr. Justice Stewart delivered the opinion of the Supreme Court. The Court rejected the appellants' contention that the North Carolina court had wide discretion to go outside the record in order to get the true facts, so that its refusal to do so amounted to a refusal to consider the constitutional claims. Appellants did not ask the North Carolina court to go outside the record, the Court noted, and furthermore the state court "has consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it". This was not a case, therefore, where the state court had failed to exercise discretionary power on behalf of appellants' "federal rights" which on other occasions it had exercised in favor of "kindred issues", the Court said. "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellants an opportunity to present their federal claim". The Court emphasized that there was no issue in this case as to the constitutional right of Negroes to use a public golf course, since the North Carolina courts had fully recognized that right at all stages.

The Chief Justice wrote a dissenting opinion in which Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan joined. The dissent argued that a fair reading of the record showed that appellants did offer the record of the federal court case in the criminal proceedings, and that even if the state grounds were adequate, the case should not be dismissed but should either be remanded or decided on the merits.

The case was argued by J. Alston Atkins for appellants and by Ralph Moody for appellee.

Constitutional law . . .
right to counsel

Hudson v. *North Carolina*, 363 U. S. 697, 4 L. ed. 2d 1500, 80 S. Ct. 1314, 28 Law Week 4472. (No. 466, decided June 20, 1960.) *On writ of certiorari to the Supreme Court of North Carolina. Reversed.*

This decision reversed a conviction for larceny because one of the petitioner's codefendants entered a plea of guilty midway through the trial and the petitioner was left without counsel to protect his rights at that crucial point.

The petitioner and two others were indicted for robbery and were tried together. One of the codefendants, Cain, had counsel, but the petitioner, who was 18, requested the court to appoint counsel for him, stating that he was without funds and was incapable of defending himself. The trial judge denied the request, telling the petitioner that "the Court will try to see that your rights are protected throughout the case". During the trial, Cain's counsel offered to represent all three defendants "as long as their interests don't conflict". Later, however, he advised Cain to plead guilty to petit larceny, a

Reviews in this issue by Rowland Young.

misdemeanor under North Carolina law. This plea was accepted by the court, and the lawyer withdrew from the proceedings. Trial of the other two defendants continued, ending in a verdict of guilty of larceny from the person, a felony. Petitioner received a sentence of three to five years, his co-defendant eighteen months to two years. Cain received a six months' suspended sentence.

In subsequent proceedings, the North Carolina Supreme Court appointed counsel for petitioner and held a hearing on his application for relief under the state's post-conviction hearing act. The court concluded that petitioner's trial had been fair and impartial and that there had been no denial of due process.

The Supreme Court reversed, speaking through Mr. Justice Stewart. The Court conceded that the petitioner was "intelligent, well-informed, and was familiar with and experienced in Court procedure and criminal trials". This was not a case, therefore, where failure to appoint counsel resulted in an unfair trial either because of deliberate overreaching by court or prosecutor or because of defendant's youth.

However, the Court went on, there was "great potential prejudice" to petitioner in the entry of the guilty plea by one of his codefendants midway through the trial. The Court said that "it was precisely at this moment . . . that the petitioner and his codefendant were left entirely to their own devices, for it was then that Cain's lawyer withdrew from the case". Petitioner did not make any request that the jury be instructed to disregard the guilty plea insofar as the remaining defendants were concerned, and no such instruction was given. "A layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt" the Court said. "Even less could he be expected to know the proper course to follow in order to invoke such protection."

Mr. Justice Clark wrote a dissenting opinion in which Mr. Justice Whittaker joined. The dissent took the position that, in spite of his youth, the petitioner was a hardened criminal, the veteran of four previous trials, who had successfully defended himself only the year before on a charge of assault and robbery. Petitioner's own defense was "shrewd" the dissent said, the only trouble being that the jury did not believe his story. Further, the dissent argued, far from prejudicing the petitioner, his accomplice's plea of guilty probably had the effect of persuading the jury to find him guilty only of larceny from the person, a lesser offense than robbery, which is the crime with which he was charged in the indictment.

The case was argued by William Joslin for petitioner and by Ralph Moody for respondent.

Constitutional law . . .
search without a warrant

Ohio ex rel. *Eaton* v. *Price*, 364 U. S. 263, 4 L. ed. 2d 1708, 80 S. Ct. 1463, 28 Law Week 4634. (No. 30, decided June 27, 1960.) *On appeal from the Supreme Court of Ohio. Affirmed by an equally divided Court.*

This case shows the Court's continuing division over the doctrine of *Frank* v. *Maryland*, 359 U. S. 360, decided in the October, 1958, term [see 45 A.B.A.J. 845 (August, 1959)]. The *Frank* case permitted the search without a warrant of a private home by a health inspector. It was a five-to-four decision, with the majority apparently feeling that the search demanded by the authorities was a reasonable one.

The Court noted probable jurisdiction of the present case at the 1958 term, only a little more than a month after the decision in the *Frank* case. Mr Justice Stewart, who was one of the majority in the *Frank* case, disqualified himself because the case came from the Ohio Supreme Court, where his father was then sitting. The remaining four members of the *Frank* majority filed a separate memorandum stating that that decision was controlling here. Mr. Justice Brennan and Mr. Justice Clark filed separate memoranda as well. See 45 A.B.A.J. 969 (September, 1959).

At the October, 1959, term, the Court was still evenly divided and the judgment below was affirmed.

Mr. Justice Brennan wrote a dissenting opinion in which the Chief Justice, Mr. Justice Black and Mr. Justice Douglas joined. These were the four dissenting justices in the *Frank* case. The dissent finds the facts here to be even stronger against permitting a search without a warrant than in *Frank*. The case involved a Dayton plumber who refused to admit to his home three men who explained that they were housing inspectors. They had no credentials, and when they were denied admission declared that they needed none under a city ordinance. They tried twice again to enter the house without a warrant and each time were refused admission. The city prosecutor finally served a warrant on the householder directing him to appear in court to answer criminal charges for refusing to admit the inspectors. Unable to post a $1,000 bond, he was committed to jail to await trial. Eaton, a lawyer, filed a petition for habeas corpus in the Common Pleas Court. The court found the ordinance unconstitutional and discharged the householder from custody. The Ohio Court of Appeals reversed, and its judgment was upheld by the Ohio Supreme Court.

The dissent pointed out that there was no showing of probable grounds to believe that a proscribed condition existed within the house or that inspectors were engaged in a regular routine spot check of a section of the city. The dissent argued that there was no reason for not requiring a warrant.

The case was argued by Greene Chandler Furman and Elbert E. Blakely for appellant and by Charles S. Rhyne and Joseph P. Duffy for appellee.

Criminal law . . .
use of mails to defraud

Parr v. *United States*, 363 U. S. 370, 4 L. ed. 2d 1277, 80 S. Ct. 1171, 28 Law Week 4411. (No. 391, decided June 13, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

This decision reversed the convictions of nine individuals and two Texas banking corporations for mail fraud and conspiracy to commit mail fraud.

The scheme involved the members and employees of a school board and officers of two banks. Some $200,000 was alleged to have been misappropriated over a five-year period by obtain-

ing checks payable to fictitious persons which were then cashed by the conspirators. Two of the petitioners obtained oil and gasoline for their own use, charging the purchases to the School District on a credit card. Under Texas law, the school board assesses and collects taxes for the support of the schools. It was the custom for the board, after determining the tax, to mail bills to the taxpayers who in most cases returned their payments by mail. It was this use of the mail that the Government contended violated 18 U.S.C. §1341. In the case of the oil company credit card, the fact that the oil company mailed its bill to the school district was the basis for the charge. The petitioners argued that, since the school board was required by Texas law to assess and collect taxes, the Board was legally authorized and compelled to cause the mailing of the bills and so the mailings could not be said to have been "for the purpose of executing" a scheme to defraud. The Government argued that, even though the taxes were lawfully levied, the mailings constituted essential steps in an unlawful scheme once it was shown that there was a plan to misappropriate the money so obtained.

The jury returned verdicts of guilty and the convictions were affirmed by the Court of Appeals.

Mr. Justice Whittaker spoke for the Supreme Court which reversed. The Court pointed out that the Board was legally required to assess and collect the taxes and that it was not charged or proved that the taxes collected were in excess of the district's needs or that they were padded or in any way unlawful, ". . . we think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing . . . plan to steal when or after received, some indefinite part of its moneys" the Court declared. As for the gasoline and oil, the Court said that the scheme to steal it was complete when the products were received and it was immaterial how the oil company collected.

Mr. Justice Frankfurter wrote a dissenting opinion in which Mr. Justice Harlan and Mr. Justice Stewart joined. The dissent reasoned that since the board had complete control of the district's fiscal affairs and determined the amount of the tax to be collected, petitioners were actually using the mails to misappropriate all the money that they intended to convert to their own use.

The case was argued by Abe Fortas and T. Gilbert Sharpe for petitioners and by Assistant Attorney General Wilkey for the United States.

Evidence . . .
silver platter doctrine

Elkins v. *United States*, 364 U. S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, 28 Law Week 4567. (No. 126, decided June 27, 1960.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Vacated and remanded.*

This decision by a unanimous Court spelled the end of the so-called silver-platter doctrine, which permitted the introduction in federal courts of evidence obtained by illegal search and seizure conducted by state officers. Evidence obtained by illegal search and seizure conducted by federal officers has been excluded from the federal courts since *Weeks* v. *United States*, 232 U. S. 383 (1914).

The petitioners were indicted in the Federal District Court in Oregon for intercepting and divulging telephone communications and for conspiracy to commit that offense. Before trial, they moved to suppress as evidence tape and wire recordings and a recording machine seized by state police officers under circumstances that were illegal under Oregon law. The District Judge denied the motion on the ground that no federal officers had participated in the illegal conduct. The petitioners were convicted and the Court of Appeals affirmed the convictions.

Mr. Justice Stewart spoke for the unanimous Supreme Court which vacated the judgments and remanded. The Court traced the history of the exclusionary rule from the *Weeks* opinion in 1914 to *Wolf* v. *Colorado*, 338 U. S. 25 (1949), which stated that the Fourteenth Amendment prohibits unreasonable searches and seizures by state officers. This removed the doctrinal underpinning of the silver platter theory, the Court declared, since that theory rested on the supposition that unreasonable searches by state officers did not violate the Federal Constitution.

The Court answered critics of the exclusionary rule (whose arguments it summarized by quoting Mr. Justice Cardozo: "The criminal is to go free because the constable has blundered") by saying that the purpose of the rule is to deter police officers from illegal searches by compelling respect for constitutional guaranty "in the only effectively available way—by removing the incentive to disregard it". The Court said that as a practical matter, the rule had not hampered the Federal Bureau of Investigation in the forty-four years since the *Weeks* decision, and it went on to set forth statistics to demonstrate that more and more states were adopting the exclusionary rule.

The case was argued by Frederick Bernays Wiener for petitioners and by Assistant Attorney General Wilkey for the United States.

Labor law . . .
arbitration

United Steelworkers of America v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593, 4 L. ed. 2d 1432, 80 S. Ct. 1358, 28 Law Week 4508. (No. 538, decided June 20, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Reversed and remanded.*

This dispute arose when a group of employees left their jobs at the plant of the respondent in protest against the discharge of one employee. A union official advised them to return to work. A company official gave them permission to do so and then rescinded it. The next day they were told they did not have jobs anymore "until this thing was settled".

The collective bargaining agreement between petitioner and respondent provided for arbitration and contained a clause agreeing to reinstatement with full compensation of any employee found by an arbitrator or the company to have been unjustly discharged.

In this case, the company refused to arbitrate and so the union went to the District Court, which ordered arbitration. The arbitrator found that the dis-

charge was not justified although the conduct of the men warranted suspension for ten days. Meanwhile, the collective bargaining agreement had expired. The arbitrator, however, rejected the contention that the expiration barred reinstatement of the employees, and he awarded reinstatement with back pay minus pay for the ten-day suspension period. The company refused to comply with the award and this suit followed.

The District Court upheld the award, but the Court of Appeals held that the failure of the award to specify the amounts to be deducted from the back pay rendered it unenforceable, and further that an award for back pay subsequent to the termination of the agreement was unenforceable, as well as the requirement for reinstatement.

The Supreme Court reversed, speaking through Mr. Justice Douglas. The Court said that the refusal of courts to review the merits of an arbitration award was a proper approach and accorded with the federal policy of settling labor disputes by arbitration. In this case, parts of the arbitrator's award were ambiguous, the Court went on, especially those relating to back pay beyond the date of the expiration of the agreement, but there was no reason to assume that the arbitrator had abused the trust confided to him or that he had strayed from the areas marked out for his consideration. The Court of Appeals' opinion was not based on any finding of this nature, the Court pointed out in reversing, but merely reflected that court's disagreement with the arbitrator's construction. "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his", the Court held.

Mr. Justice Frankfurter noted that he concurred in the result.

Mr. Justice Black took no part in the consideration or decision of the case.

Mr. Justice Whittaker, in a dissenting opinion, argued that the sole question was whether the arbitrators exceeded their powers in awarding the reinstatement. "Like the Court of Appeals, I think they did" he said. "I find nothing in the collective agreement that purports to so authorize." Furthermore, he argued, no rights accrued under the agreement after it expired. The agreement protected the employees during its consideration, but when it expired the employment status of the eleven employees was terminable at the will of the employer.

The case was argued by Elliot Bredhoff and David E. Feller for petitioner and William C. Beatty for respondent.

Labor law . . . *arbitration*

United Steelworkers of America v. *Warrior and Gulf Navigation Company*, 363 U. S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347, 28 Law Week 4502. (No. 443, decided June 20, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

This decision held that an employer's refusal to submit the question of "contracting out" work to an arbitrator was a violation of his collective bargaining agreement with the petitioner union.

The collective bargaining agreement contained this provision: "Issues which conflict with a Federal statute . . . or matters which are strictly a function of management shall not be subject to arbitration under this section." The next paragraph began, "Should differences arise between the Company and the Union . . . as to the meaning and application of the provisions of this Agreement . . . there shall be no suspension of work . . . but an earnest effort shall be made to settle such differences immediately in the following manner . . ." Submission to an umpire was one of the methods of settling disputes specified.

The union objected to the respondent's contracting out a large amount of the maintenance work on its barges, resulting in the lay-off of employees, and, when the respondent refused to submit the dispute to an arbitrator, commenced this suit in the District Court. The District Court denied relief, holding that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here". The Court of Appeals affirmed by a divided vote.

Mr. Justice Douglas reversed for the Supreme Court. The Court said that a collective bargaining agreement was more than a contract: "it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." Arbitration, the Court went on, is the means of solving the unforseeable by molding a system of private law for the problems that may arise and, apart from matters that the parties specifically exclude, "all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."

To be sure, the Court said, this particular agreement excluded "matters which are strictly a function of management" from arbitration, but it went on to say that if differences arise, the grievance procedure should be applicable. Here the union alleged that contracting-out violated the agreement, the Court reasoned; hence, there was a dispute "as to the meaning and application of the provisions" which the parties had agreed would be determined by arbitration.

Mr. Justice Frankfurter noted that he concurred in the result.

Mr. Justice Black took no part in the consideration or decision of the case.

Mr. Justice Whittaker wrote a dissenting opinion that declared that the Court was enunciating "new and strange doctrine". An arbitrator was a private judge, chosen by the parties, he argued, and the contract under which the arbitrator is appointed is the source and limit of this authority.

Moreover, there was nothing in this agreement to indicate that the employer "signified willingness" to submit to arbitrators the question whether it must cease contracting out work, the dissent declared.

The case was argued by David E. Feller for petitioner and by Samuel Lang for respondent.

Labor law . . . *arbitration*

United Steelworkers of America v. *American Manufacturing Company*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, 28 Law Week 4500. (No. 360, decided June 20, 1960.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

This was a suit by the petitioner union, on behalf of one of its members, to compel arbitration of a grievance pursuant to its collective bargaining agreement with the respondent.

The employee left his work because of an injury and, while off work, brought an action for compensation benefits. The case was settled after his physician expressed the opinion that the injury had caused a 25 per cent permanent partial disability. Two weeks later, the union filed a grievance, charging that the employee was entitled to return to his job by virtue of the seniority provisions of the collective bargaining agreement. The respondent refused to arbitrate, and this suit was filed in the District Court. The respondent defended on the grounds that, having settled the workman's compensation claim, he was estopped, that he was physically unable to do the work and that this type of dispute was not arbitrable under the agreement.

The District Court found for the company, on the reasoning that the employee was estopped to claim any employment rights because of his settlement of the workman's compensation claim. The Court of Appeals affirmed, but for different reasons. That court held that the grievance was "a frivolous, patently baseless one, not subject to arbitration".

The Supreme Court reversed, again speaking through Mr. Justice Douglas. The Court said that the collective bargaining agreement provided that all grievances were to be arbitrated, "not merely those that a court may deem to be meritorious". "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator" the Court said. "It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."

Here, the union claimed that the company had violated the contract; the company took the position that it had not, the court went on. Therefore there was a dispute between the parties, which, under the agreement, was for arbitration, the Court held.

Mr. Justice Frankfurter noted that he concurred in the result.

Mr. Justice Whittaker noted that he concurred in the result on the ground that the District Court lacked jurisdiction to determine the merits of the claim which the parties had agreed to arbitrate.

Mr. Justice Black took no part in the consideration or decision of the case.

The case was argued by David E. Feller for petitioner and by John S. Carriger for respondent.

Mr. Justice Brennan, who concurred in the Court's opinions in Nos. 443, 360 and 538, wrote a concurring opinion in Nos. 443 and 360. Mr. Justice Harlan and Mr. Justice Frankfurter joined him in this opinion. The opinion held that the fundamental question in both Nos. 443 and 360 was whether the company agreed to arbitrate a particular grievance. In *American*, the court, having found that the agreement committed to arbitration any "dispute, difference, disagreement, or controversy of any nature or character" had exhausted its function, except to order arbitration. In *Warrior*, the agreement excluded a particular area from arbitration—"matters which are strictly a function of management", and in this case, the court was required to examine the substantive provisions of the contract to ascertain whether the parties had provided that contracting out was to be a "function of management".

Social Security . . . *termination of benefits*

Flemming v. *Nestor*, 363 U. S. 603, 4 L. ed. 2d 1435, 80 S. Ct. 1367, 28 Law Week 4476. (No. 54, decided June 20, 1960.) *On appeal from the United States District Court for the District of Columbia. Reversed.*

This decision held that entitlement to Social Security benefits does not constitute "accrued property rights" that are entitled to the protection of the due process clause of the Fifth Amendment.

The appellee was an alien who had immigrated to this country from Bulgaria in 1913. He became eligible for old-age benefits in November, 1955. In July, 1956, he was deported pursuant to Section 241(a)(6)(C)(i) of the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939. Section 202(n) of the Social Security Act, 68 Stat. 1083, as amended, provides that Social Security benefits shall terminate for any alien deported for any one of fourteen grounds, one of which is membership in the Communist Party. The appellee failed to obtain administrative reversal of the termination and took his case into the District Court which ruled in his favor, holding Section 202(n) unconstitutional.

The Supreme Court reversed, speaking through Mr. Justice Harlan. The Court characterized the Social Security system as "a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the "general welfare"'", but it added that "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits are bottomed on his contractual premium payments." The Court explained that to engraft upon the Social Security system a concept of "accrued property rights" would deprive it of "the flexibility and boldness in adjustment to ever-changing conditions which it demands". The Court added that of course Congress could not modify the statutory scheme free of all constitutional restraint, but here there was no arbitrary classification, lacking in rational justification, that would render the statute invalid.

The Court refused to consider the termination of benefits as punitive—the sanction, it said, was "the mere denial of a noncontractual govern-

mental benefit", and it rejected the arguments that the termination amounted to a bill of attainder and constituted an *ex post facto* enactment.

Mr. Justice Black wrote a dissenting opinion which argued that the Court was, in effect, holding that, in spite of the contributions by the covered workers, the Social Security payments were merely gifts from the Government, which it could terminate at will. This was contrary to the whole purpose and intent of the system, the dissent argued. Mr. Justice Black also contended that the statute was *ex post facto* and a bill of attainder.

Mr. Justice Douglas wrote a dissenting opinion which took the position that Section 202(n) was a bill of attainder. He contended that termination of the Social Security benefits here was different only in degree from confiscation of an alien's home on deportation or appropriation of his savings account.

Mr. Justice Brennan wrote a dissenting opinion in which the Chief Justice and Mr. Justice Douglas joined. This opinion stressed the *ex post facto* features of 202(n) and found in it an unconstitutional punishment without benefit of a judicial trial, since the statute brought forfeiture of benefits only to certain classes whose conduct was clearly considered by Congress to be blameworthy. "Today's decision sanctions the use of the spending power not to further the legitimate objectives of the Social Security program" the opinion declared, "but to inflect hurt upon those who by their conduct have incurred the displeasure of Congress."

The case was argued by John F. Davis for appellant and by David Rein for appellee.

States . . .

seaward boundaries

United States v. *Louisiana*, 363 U. S. 1, 4 L. ed. 2d 1025, 80 S. Ct. 961, 28 Law Week 4339. (No. 10, Original, decided May 31, 1960.) *On motion for judgment on the pleadings. Granted in part and denied in part.*

This case, invoking the Court's original jurisdiction, was another round in the controversy over the off-shore tidelands. The importance of the decision is perhaps indicated by the unusual circumstance that a United States Senator and the Governor of a state argued the cases for their states.

The suit was brought by the United States seeking a declaration that it was entitled to full dominion over the land underlying the waters of the Gulf of Mexico more than three geographic miles seaward from the coasts of each of the Gulf States. The suit asked that the five states concerned be enjoined from interfering with the rights of the United States in the area and that they be required to account for all money derived by them therefrom since June 5, 1950.

The case demanded construction of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301-1315. That statute had ceded to the coastal states "the entire interest of the United States in all lands beneath navigable waters within state boundaries"; the statute further defines state boundaries "as they existed at the time [a] State became a member of the Union, or as heretofore approved by the Congress". There was a further provision that the state boundaries of the Gulf States were not to extend more than three marine leagues (nine marine miles, about ten and a half statute miles) seaward.

The Government took the position that this language granted submerged land rights to a distance of more than three miles only if a state could show that it had a legally established seaward boundary in excess of three miles at the time of its admission to the Union or that such a boundary was thereafter approved by Congress.

The states argued that the statute *ipso facto* makes a three-league grant to all the Gulf States, or at least that it establishes the seaward boundary of some of the states at three leagues. In the alternative, they contended that if the extent of the state boundaries was left to judicial determination, then the question was what seaward boundary each state had just prior to admission.

The Court's opinion, written by Mr. Justice Harlan, is quite long, and takes up first the issues that were common to all the states involved and then discusses each state's claim separately. Florida's claims were considered in a separate opinion *(infra)*.

The Court recalled that the original thirteen states owned the land beneath the navigable waters within their territorial borders, and that it was assumed for many years that the same rule applied to the tidelands. The controversy over the latter began in the 1930's, centering around the ownership of the oil-rich submerged lands off California. In *United States* v. *California*, 332 U. S. 19, 804, the Court held that the Federal Government possessed paramount rights in the offshore lands. The Submerged Lands Act was "quitclaim" legislation, intended to give to the states rights that many had always assumed they possessed. The Court examined the legislative history of this statute and concluded that the boundaries mentioned in it were to be determined by reference to the historical events surrounding the admission of the various states to the Union.

Turning first to Texas, the Court confessed that it could find no answer to the question in the 1845 annexation resolution by which that state entered the Union. It found, however, that the Texas Congress had passed a boundary act in 1836, while Texas was an independent republic, which established its seaward boundary at three leagues beyond the shore line. The same boundary line was mentioned in the Treaty of Guadalupe-Hidalgo, signed in 1848 between the United States and Mexico, which ended the Mexican War and fixed the boundary between the two countries. From this, the Court deduced that the Texas maritime boundary at the time of annexation was three leagues from its coast, at least so far as the domestic affairs within the United States were concerned.

The other three states parties to this case did not fare so well. The Court took up the contentions of Louisiana, Mississippi and Alabama one at a time. It examined the history of each state from the earliest territorial claims by European nations but could find nothing in the documents it examined to indicate that the boundaries of these states had ever extended beyond three miles from the shore, except for offshore islands which had been expressly included within their borders by the instruments admitting them to the Union. Accordingly, the Court ruled

that the seaward boundaries of these three states extended only three miles beyond the islands.

The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of the case.

Mr. Justice Black wrote an opinion concurring in the determination as to Texas but dissenting as to Louisiana, Mississippi and Alabama.

His opinion argued that Congress had intended, by the Submerged Lands Act, to have the ancient boundaries of the Gulf States determined on the basis of their long-unchallenged claims in the hope of finally settling the tidelands controversy. The use of "subtle and refined legal inferences" only frustrated this congressional purpose, the opinion declared.

Mr. Justice Douglas wrote a dissenting opinion which canvassed the history of the annexation of Texas to show that neither the 1836 boundary act of the Republic of Texas nor the Treaty of Guadalupe-Hidalgo settled the seaward boundary of that state. The language used is ambiguous in all the early descriptions of the seaward territories of the Gulf States, the dissent went on, and if Texas is to be given the benefit of the doubt, the same standard should be applied to the other states involved.

The cases were argued by Solicitor General Rankin and George S. Swarth for the United States; by Price Daniel, Will Wilson, James P. Hart and J. Chrys Dougherty for the State of Texas; by Jack P. F. Gremillion and Victor A. Sachse for the State of Louisiana; by Joe T. Patterson and John H. Price, Jr., for the State of Mississippi; and by Gordon Madison for the State of Alabama.

States . . .

seaward boundaries

United States v. *Florida*, 363 U. S. 121, 4 L. ed. 2d 1096, 80 S. Ct. 1026, 28 Law Week 4374. (No. 10, Original, decided May 31, 1960.) *On motion for judgment on the pleadings. Denied.*

This opinion dealt with Florida's claims to a three-league seaward boundary in the tidelands controversy. The Court wrote a separate opinion because the Florida claim rested on its boundaries on readmission to the Union in 1868, during the Reconstruction.

The Court's opinion was written by Mr. Justice Black. It noted that the Florida Constitution, approved by the readmission act of 1868, described Florida's boundary on the Gulf of Mexico as running from a point in the Gulf "three leagues from the mainland" and "thence northwestwardly three leagues from the land", and so on. While the Government had contended that the readmission enactments did not contemplate a general scrutiny of all the provisions of the state constitutions, the Court replied that the "constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this".

The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of the case.

Mr. Justice Frankfurter, joined by Mr. Justice Brennan, Mr. Justice Whittaker and Mr. Justice Stewart, wrote a concurring opinion which took the position that there was nothing in the Submerged Lands Act that required express approval of a state's boundary by a prior Congress and that the statute deliberately left open the question whether the approval of the 1867 Florida Constitution by the Reconstruction Congress amounted to an approval of the three-league boundary. "I sustain Florida's claim because I think that its boundary was so approved" the opinion declared.

Mr. Justice Harlan, dissenting, argued that Florida had left the Union with a three-mile seaward boundary and that there was no evidence at all that Congress intended to readmit her with a three-league boundary. All that was meant by congressional approval of the state constitution, he declared, was that Congress was satisfied that the constitution had been properly adopted and provided for a republican form of government.

The case was argued by Spessard L. Holland and Richard W. Ervin for the State of Florida, and by Solicitor General Rankin and George S. Swarth for the United States.

What's New in the Law

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Criminal Law . . .
counsel of own choice

An Illinois lawyer has won a reversal of his conspiracy conviction on the ground that the trial judge would not permit him to employ counsel of his own choice.

The defendant was indicted, along with six other persons, including an assistant probate judge and the public administrator of Cook County, for conspiring to obtain a decedent's estate by foisting off one of the persons indicted as a daughter of the decedent. The spurious daughter and her husband testified for the state and the other defendants obtained severances from each other.

Originally one attorney, Bellows, represented both the defendant involved in this appeal, Friedrich, and another defendant, Zahler. In his motion for a severance Zahler contended that his defense and Friedrich's would be antagonistic and that his right to a fair and impartial trial would be jeopardized if there were a joint trial. Bellows said it would be difficult if not impossible for him to defend both men in a joint trial.

At this point the trial judge suggested that Bellows shouldn't be defending both of them anyway, because of conflicting interests, but Bellows replied that ethically he could give both of them good defenses in separate trials. But the trial judge indicated he would grant the severance only if Bellows withdrew from one case, and thereafter he withdrew as Friedrich's counsel.

Later Friedrich obtained another attorney, but after a disagreement they parted, and Friedrich petitioned for leave to retain Bellows. He stated that he knew Bellows represented Zahler, and that both he and Zahler would file consents to Bellows' employment. The judge refused to permit the employment and Friedrich went to trial and was convicted after retaining another lawyer.

The Supreme Court of Illinois reversed the conviction, declaring that Friedrich has been deprived of his right to appear and defend in person and by counsel, as guaranteed by the Illinois Constitution. The right to counsel, the Court said, includes the right to employ counsel of one's own choice.

The Court suggested that the trial judge may have been misled by the statements in the petition alleging antagonistic defenses, and that in trying to protect Friedrich, he in fact violated his rights. "The grounds which require a severance", it stated, "are different from those which prevent an attorney from representing conflicting interests." It pointed out that the full-disclosure and express-consent provisions of Canon 6 of the Canons of Professional Ethics had been complied with by Bellows and that both Zahler and Friedrich desired Bellows as counsel. And the Court observed that in separate trials Bellows could give each client his undivided loyalty.

"It is the general rule", the Court concluded, "that it is not the duty of the court to advise or exercise any authority or control over the selection of counsel by a defendant who is able to and does employ counsel of his own choice. There are no circumstances present here to warrant a departure from this rule."

(*Illinois* v. *Friedrich*, Supreme Court of Illinois, September 29, 1960, Hershey, J.)

Criminal Law . . .
unlicensed poet

A self-styled "visual chronicler" of the "beat generation" has escaped conviction in a New York court on a charge of being an unlicensed orator.

The defendant was charged with violating the Rules and Regulations of the Department of Parks of New York City "in that he did recite an oration" in Washington Square Park without obtaining the permit required by the regulations. The sole prosecution witness—a policeman—could not testify to what the defendant said, but only that he saw the defendant's lips moving and people gathered around him. On the other hand, the accused said he was merely reading some of his own poetry to a group gathered without pre-arrangement, and he put the poetry in evidence.

Whereupon the City Magistrates' Court discharged the defendant. The judge noted that neither the regulations, statutes nor cases told him what "recite an oration" meant, and that he was accordingly driven to the classical authorities. After citing and quoting from Plutarch, Aristophanes, Shakespeare, Lord Tennyson, Milton, Ovid, Carlyle, Lord Macaulay, Wordsworth, Emerson, Wilde, Goethe, William Blake, Robert William Chapman and Elwyn Brooks White, the Court concluded that poetry is the antithesis of oratory. "The reading aloud of one's own poetry in a public place, in the hearing of all men but the complaining witness for the People, is not the recitation of an 'oration' so as to require the prior issuance of a Park Department permit", the judge concluded.

(*New York* v. *Morris*, City Magistrates'

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Court of New York, Borough of Manhattan, April 13, 1960, Bayer, M., 23 Misc. 2d 242.)

Declaratory Judgments . . . *what is necessary*

The well-known scientist, Linus Pauling, has failed in an attempt to maintain a declaratory judgment action seeking to have the courts void a directive of a Senate investigating subcommittee for him to appear with certain letters at a subsequent date. The Court of Appeals for the District of Columbia Circuit held that the suit failed to present a justiciable controversy.

Pauling appeared before a Senate subcommittee investigating an international petition to the United Nations urging an international agreement for the cessation of testing of nuclear weapons. Pauling had participated in the preparation of the petition and he was directed to appear later on a specific date with all the signatures and with the letters of various persons transmitting signatures to him. He declined to produce the letters because he feared the writers would be subjected to "reprisals" for their parts in the petition. Then he brought his declaratory judgment suit. He asked that the subcommittee directive be declared void and that the subcommittee be enjoined to enforce the directive or to prosecute for contempt if he failed to comply. Later on argument he conceded the unavailability of an injunction.

Remarking that judicial authority does not come into being *in vacuo*, the Court affirmed the district court's dismissal of the complaint. "For declaratory judgment", the Court explained, "there must not only be a controversy, but the controversy must be justiciable. . . No detention has occurred. The date when Pauling must decide whether to comply or not to comply with the directive has not arrived. He has not been cited for contempt or reported to the Senate for citation. . . It seems quite clear that as a matter of basic general principle a court cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries. . ."

While it agreed that the courts have power to review a conviction in a criminal case for contempt of Congress and may hold the attempted congressional action invalid, the Court pointed out that that was an exercise of judicial authority occasioned by an event—the conviction. Under the separation-of-powers doctrine, the Court remarked, it has no power of interference until some event, such as arrest, indictment or conviction, brings an actual controversy into the sphere of judicial authority.

Pauling attempted to draw an analogy between his suit and a petition for a writ of habeas corpus, but the Court rejected it. He argued that if he were under detention he could test the subcommittee's right by habeas corpus, and that the same remedy should be available to him by declaratory judgment when not under detention. The Court dismissed this argument by pointing out that the very purpose of habeas corpus is to test the right of detention and that without detention there is no availability of habeas corpus. Therefore, it said, the "rights available under the writ do not arise when the basic justification for the writ does not exist".

(*Pauling* v. *Eastland*, United States Court of Appeals for the District of Columbia Circuit, September 7, 1960, Prettyman, C.J.)

Federal Procedure . . . *separate trials*

A rule of the United States District Court for the Northern District of Illinois providing for separate trials on the issues of liability and damages has stood a successful muster before the Court of Appeals for the Seventh Circuit, although the Court admittedly did not consider one principal ground of objection.

The rule provides that a separate trial may be had on the issue of liability on the motion of either party or "at the court's discretion" in cases "wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues. . ." In the instant case—a suit for personal injuries against a railroad—the judge severed the issue of liability on his own motion the day before the trial. Both parties objected then, but the appeal was taken by the plaintiff when the defendant got a "not guilty" verdict without offering any evidence.

The defendant's objection was that the issues of liability and damages might be tried before two juries if they were tried separately. Since this point was never reached in the case, because liability was not found, the Court said that it would not pass on that argument, although the plaintiff strove to adopt it on his appeal. The Court conceded that that contention—whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some issues are submitted to one jury and some to another—posed a difficult question, but it emphasized that it did not pass on it.

The ground considered by the Court was that the rule abridged and modified the right to a jury trial as guaranteed by the Seventh Amendment, which states that "the right of trial by a jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Court also observed that 28 U.S.C.A. §2072 provides that rules of practice and procedure "shall preserve the right of trial by jury as at common law. . ." The plaintiff claimed that the severance-of-issues rule changed the ancient and long-established manner of conducting trials of civil cases at common law.

The Seventh Circuit did not agree with this contention. It declared that the right to trial by jury guaranteed by the Federal Constitution does not necessarily mean a trial replete with the exact procedural incidents and details of the common law of 1791. It noted that Rule 42(b) of the Federal Rules of Civil Procedure, under which the District Court adopted its rule, permits separate trials "of any separate issue".

"We hold", the Court concluded, "that in the trial of the instant case, the essential character of a trial by jury was preserved. In our view, the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue."

Turning to a more specific approval

of the District Court rule, the Court declared:

> Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no exception. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases upon their calendars. There is no doubt that in numerous cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages.

The Court concluded by cautioning that the rule must be carefully administered, and it warned that it should not be used in a case in which the "question as to the injuries has an important bearing on the question of liability". As an example the Court mentioned one of its recent cases in which the location of burns on the face and upper part of the plaintiff's body was a consideration in determining whether the flame that caused an explosion came from a spark of static electricity near the floor or from a pilot light near the top of a gas stove.

(*Hosie* v. *Chicago and North Western Railway Company*, United States Court of Appeals for the Seventh Circuit, September 28, 1960, Duffy, C.J.)

Husband and Wife . . . *annulments*

A New York wife asking for an annulment on the ground that her husband fraudulently failed to procreate has suffered a dismissal of her complaint for failure to prove the necessary elements of fraud.

The most serious question the Nassau County Supreme Court, Special Term, faced in deciding the case was the weight it had to give the wife's uncontradicted testimony. The husband defaulted, and this brought the Court to a line of New York decisions applying to uncontested annulment cases the principle enunciated in an early New York case that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded. The Court turned to the state's civil practice act, which requires that the proof must be more than the mere declaration or admission of either party to the marriage, and to later decisions, particularly one holding that the other evidence must be "substantial and reliable enough to satisfy the conscience of the trier of the facts".

In view of this the Court concluded that the unimpeached, uncontradicted testimony of a witness may be rejected by the trier of facts in an uncontested matrimonial cause. Otherwise, the Court remarked, the "conscience" principle would be meaningless. This conclusion meant that the Court considered himself free to disregard the testimony of the wife.

Turning to the evidence offered, the Court noted that fraud consists of three elements: misrepresentation, scienter and reliance-change of position. He pointed out that under New York law an express or implied promise to have normal sex relations with a view toward procreation relates to something vital to a marriage, and that a misrepresentation concerning it will support an action for annulment.

The parties had been married about six years when the wife commenced the suit. She admitted that for three and one-half years she had acquiesced in the use of contraceptive devices, apparently at her husband's request. The situation during the other two and one half years was not clear to the Court, because the wife's separation had taken her only to her mother's home, which was in close proximity to the apartment in which the husband continued to live.

The Court said that the proof did not show that there ever was a premarital fraudulent intent on the part of the husband not to procreate or that the wife would not have married him if aware of the intent. "Moreover", the Court said, "if there were such an intention the Court is convinced that this plaintiff would have become aware of it very early in marriage. Her acquiescence for the lengthy period in question amounted to a condonation."

(*Roger* v. *Roger*, New York Supreme Court, Special Term, Nassau County, February 25, 1960, Brennan, J., 203 N.Y.S. 2d 576.)

Municipalities . . . *liability*

The Supreme Court of Alabama has declined to find the City of Birmingham liable for the alleged negligence of its employees in allowing a deer to escape while being delivered to a zoo operated in a city park.

The animal, described as a "buck deer", was owned by the Birmingham Zoological and Botanical Garden Society, which leased premises in a city park on which it operated a zoo. The deer was being taken to the zoo in a city truck by city employees as an accommodation to the Society. He escaped, went into a neighboring suburb and severely mauled the plaintiff. She sued for $10,000.

Alabama uses the familiar rule to determine the liability of a municipality: if the activity is in the pursuance of corporate or ministerial functions, the municipality is liable; but if in pursuance of governmental functions, there is no liability. This leaves the only question for decision whether the alleged negligent or wrongful conduct occurred in the performance of ministerial or governmental functions. To arrive at this dichotomy Alabama uses the test "whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity".

Applying this test, the Court concluded that the employees who let the deer get away were performing governmental functions in that they were engaged in the operation and maintenance of a public park which happened to include a zoo. The nature of the duties, the Court added, was not altered by the fact that the deer was owned by a private organization permitted to maintain the zoo in the park under lease.

The Court noted that it has held that the operation of a municipal art museum, a municipal swimming pool and a municipal golf course are governmental functions. "We think", it declared, "that to hold the function [of zoo operation] public and governmental, and not merely corporate or ministerial, is in the spirit of decisions heretofore rendered by this Court." It conceded, however, that the rule on zoos is not uniform. In New York,

Oklahoma and Texas decisions have held the operation of a zoo a corporate activity, while in California and Kansas courts have ruled it governmental.

(*Smith* v. *City of Birmingham*, Supreme Court of Alabama, June 30, 1960, Lawson, J., 121 So. 2d 867.)

Negligence . . . *bottle cases*

In a cigar-butt-in-the-bottle case the Supreme Court of Georgia has reasserted that the doctrine of *res ipsa loquitur* is applicable, but only after sufficient proof has been offered to authorize a jury to conclude that the bottle was in the same condition when the plaintiff opened it as when it left the manufacturer or bottler.

The trial court had submitted the case to the jury on an instruction indicating that negligence of the bottler could be inferred where the proof shows no more than the actual presence of the foreign substance in the bottle at the time it was purchased and consumed. Reviewing Georgia decisions, the Court ruled that in bottle cases the conclusion is not inescapable that the foreign substance is there through the bottler's negligence, since the cap may have been removed and replaced. Therefore, additional proof is necessary. The Court indicated this requirement might not apply to a sealed-can case.

In looking at the evidence, however, the Court concluded that the plaintiff had proved sufficiently to support the verdict that the bottle was in the same condition when she purchased it as when it left the bottler. One judge dissented on the ground that this proof was not sufficient.

(*Macon Coca-Cola Bottling Company* v. *Chancey*, Supreme Court of Georgia, May 5, 1960, Mobley, J., 114 S.E. 2d 517.)

Paternity . . . *conception in wedlock*

About the strongest of the English common law's rebuttable presumptions was that a child born in wedlock was the legitimate child of the parties to the marriage. Applying this principle to the case before it, a Florida court has refused to permit a mother to maintain a paternity suit seeking to have a child conceived in wedlock declared to be the child of a man other than her former husband.

From the chronological standpoint, both the mother and her former husband said they had no sexual intercourse after the second week of May, 1958. The pregnancy occurred in December of 1958, and the mother divorced the husband in February, 1959. About two months later she commenced the suit to have the defendant declared the actual father.

In part the mother relied on the Florida statute, which allows "[a]ny unmarried woman who shall be pregnant . . . [to] bring proceedings . . . to determine the paternity of such child". She said she fitted that description. But the District Court of Appeal for the Second District declined to be swayed by this argument. It pointed out that the statute had formerly spoken of a "single woman" and that the legislative change from that to "unmarried woman" was not sufficient to merit a construction other than that given to the former wording.

Reviewing Florida decisions emphasizing the social policy underlying the common-law rule, the Court said: "After a careful consideration of the cases cited herein along with the dictates of sound moral public policy, we conclude the rule in Florida to be that a mother is not permitted to have a child which has been conceived in wedlock declared to be illegitimate. Children which are conceived and born in lawful wedlock are legitimate. Likewise, children conceived during lawful wedlock are not rendered illegitimate by the subsequent dissolution of the marriage by death or divorce before the birth of the child."

(*Sanders* v. *Yancey*, District Court of Appeal of Florida, Second District, July 1, 1960, Allen, J., 122 So. 2d 202.)

Separate Maintenance . . . *abandonment*

The New York Court of Appeals has held that a wife's repudiation of the validity of her marriage and her refusal to have sexual relations with her husband unless they were remarried in her church entitles the husband to a decree of separation.

The wife was a Roman Catholic, but when they were married, according to the testimony of the husband, who was a Protestant, she had agreed that his church would be her church. They were married in a Protestant church. After seven years of marriage and the birth of one child, the wife consulted a Roman Catholic priest, following which she told her husband she was not married to him in the eyes of her church and that she would have no further sex relations with him unless he submitted to a second marriage ceremony in the Roman Catholic Church. When she persisted in this position, the husband sought a separation on the ground that the wife's conduct was "cruel and inhuman".

The Court of Appeals reversed the refusal of the lower courts to grant the separation, but it grounded its decision on a conclusion that the wife's conduct was abandonment. The Court declared that marriage involves something more fundamental than "mere physical propinquity" and that not "every denial of a marital right will be sufficient to support a charge of abandonment". But, it continued, a separation will be allowed where the denial affects one of the foundations of the marriage.

It said: "Sexual relations between man and woman are given a socially and legally sanctioned status only when they take place in marriage and, in turn, marriage is itself distinguished from all other social relationships by the role sexual intercourse between the parties plays in it. This being so, it may not be doubted that a total and irrevocable negation of what is lawful in marriage and unlawful in every other relationship, of what unmistakably and uniquely characterizes marriage and no other relationship, constitutes abandonment in the eyes of the law."

The Court rejected the wife's argument that her actions were supported by good cause and justification. It agreed that she acted without malice and was motivated by religious convictions, but, it added "[i]f . . . she considers her marriage invalid and non-existent and, on that account, neg-

lects the fulfillment of a primary marital obligation, in fairness and in law her husband must likewise have the power to free himself of its obligations."

Two judges dissented on a procedural ground. They contended that the Court could not grant the separation on abandonment since the complaint was based on cruelty and the suit was tried on that theory. The majority disposed of this point by holding that the complaint alleged facts sufficient to constitute abandonment and that it would be "hypertechnical" to require the pleader to attach a particular label to his complaint.

(*Diemer* v. *Diemer*, Court of Appeals of New York, July 8, 1960, Fuld, J., 8 N. Y. 2d 206, 654 N.E. 2d 168.)

Taxation . . .
state's power

The imposition by the City and County of Los Angeles of an apportioned personal property tax on airplanes of the Scandinavian Airlines System has been approved by the California District Court of Appeal for the Second District.

The tax—an *ad valorem* personal property levy—was assessed as of the first Monday of March, 1955, on the thirteen S.A.S. aircraft that were regularly in Los Angeles on international flights, and was apportioned on the basis of the hours they spent in Los Angeles as compared to the total hours in a year. Each of the airplanes was registered in one of the Scandinavian countries and taxed there on an unapportioned basis.

The Court turned down an argument that the imposition of the tax violated due process of law concepts. It found the state of the law clear that Los Angeles could impose the tax either under the "sufficiency of contact" doctrine of *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U. S. 590, or under the expanded "taxable situs" rule applied by the Supreme Court of California in *Flying Tiger Line, Inc.* v. *County of Los Angeles*, 333 P. 2d 323, in which the Court had assumed that the aircraft had also acquired a taxable situs elsewhere.

The S.A.S. argument that the Los Angeles assessment resulted in double taxation was also rejected by the Court, but not without some extended consideration. First the Court said that the question of double taxation could not be raised under the concept of a due process violation because S.A.S. is a non-resident of the United States and therefore not entitled to the protection of the Fourteenth Amendment. But then it turned to the contention that taxation and double taxation were burdens which the state could not impose on foreign commerce in view of the commerce clause of the Federal Constitution.

Pointing to the cases, the Court concluded that the imposition of an apportioned tax on personal property used in foreign or interstate commerce does not violate the constitutional provision. But it conceded that there was a further question posed by the admitted fact that the Los Angeles tax did constitute multiple taxation. It agreed that multiple taxation may result either where the domiciliary state of the personal property levies an unapportioned tax despite the fact that the property is in other states for considerable periods, or where there are different apportionment formulae used. "Thus", the Court concluded, "the onus of double taxation falls not on the jurisdiction levying a fairly apportioned tax but upon the domiciliary jurisdiction which refuses to apportion its taxes on the basis of benefits and protections actually conferred." Applying that statement to the present case, the Court remarked that any burden on S.A.S. was imposed not by California but by the countries of registry. "Since the root of the evil is to be found in foreign soil", the Court said, "the sovereign power of this state is not poisoned by the fruit."

The Court also rejected an argument that the Federal Government had preempted the field.

(*Scandinavian Airlines System, Inc.* v. *County of Los Angeles*, California District Court of Appeal, Second District, July 22, 1960, Fox, P.J., 183 A.C.A. 69, 6 Cal. Rptr. 694.)

Torts . . .
right of privacy

A mother's right-of-privacy suit based on a magazine's articles concerning the murder of her 14-year-old son has been dismissed by the Appellate Court of Illinois for the First District.

The suit was grounded on two *Look* articles purporting to be accounts of the murder as related to the magazine writer by the two men who were accused of the murder but tried and acquitted. In only one sentence was there a reference to the plaintiff, and that was only that she was notified of her son's kidnapping.

Illinois has recognized a common-law right of privacy action in two cases. The first concerned the commercial use of the plaintiff's picture on a dog-food label—a situation the Court found unlike the instant case. The other involved the use of a detective's widow's picture in a magazine called *Inside Detective* to illustrate a story about the detective's death at the hands of a gangster.

The Court refused to extend the action to cover the instant case. It emphasized that the "right of privacy is not a guaranty of hermitic seclusion" and that it must be defined against the current background of social custom and habit. Noting that everyone is subjected to some intrusions on his privacy, the Court declared that the purpose of the action is to find "an area within which the citizen must be left alone". But, it continued, "even so, chance or destiny may propel a private citizen into public gaze."

(*Bradley* v. *Cowles Magazines, Inc.*, Appellate Court of Illinois, First District, May 16, 1960, rehearing denied June 13, 1960, Schwartz, J., 168 N.E. 2d 64.)

Proceedings of the House of Delegates: Washington, D. C., August 29—September 2

The pages that follow contain a full summary of the proceedings of the House of Delegates, the governing body of the American Bar Association, at the 1960 Annual Meeting in Washington. The House is composed of State Delegates, one elected by Association members in each state, representatives of all state bar associations and many large local associations as well as a number of other organizations of the legal profession and individual office holders, *ex officio*. Each Section of the Association has one delegate. The summary contains the full text of all resolutions adopted by the House. These resolutions represent the official policy of the American Bar Association.

First Session

The House of Delegates held five sessions during the 83d Annual Meeting in Washington, D. C. All the sessions were held in the Presidential Ballroom of The Statler-Hilton, with the Chairman of the House, Sylvester C. Smith, Jr., of Newark, New Jersey, presiding.

The first session convened at 10:00 A.M. on Tuesday, August 30.

After the call of the roll by the Secretary of the Association, Joseph D. Calhoun, of Media, Pennsylvania, the Committee on Credentials and Admissions reported through its acting chairman, C. Brewster Rhoads, of Philadelphia. Mr. Rhoads said that his Committee had approved the roster of delegates as read by the Secretary, and on his motion the House voted to accept it. Mr. Rhoads then introduced the following new members of the House:

Walter M. Bastian, of Washington, D. C.; Richard K. Sharpless, of Honolulu, Hawaii; Edward B. Love, of Monmouth, Illinois; Harold Horvitz, of Boston, Massachusetts; Joseph Schneider, also of Boston; David Stoffer, of Newark, New Jersey; William J. Isaacson, of New York City; Lewis J. Poisson, Jr., of Wilmington, North Carolina; Vincent P. McDevitt, of Philadelphia; Thomas W. Pomeroy, Jr., of Pittsburgh; Bernard G. Segal, of Philadelphia; Arthur J. Levy, of Providence; Gibson Gayle, Jr., of Houston; Edwin Cortes-Garcia, of San Juan, Puerto Rico; Ross H. Oviatt, of Watertown, South Dakota; Charles Horowitz, of Seattle.

On the motion of Secretary Calhoun, the House voted to approve the record of its 1960 Midyear Meeting in Chicago.

On motion of Osmer C. Fitts, of Brattleboro, Vermont, Chairman of the Committee on Rules and Calendar, the House voted to adopt the printed calendar (with a few rearrangements of some items) as the order of the day.

Report of the Treasurer

Glenn M. Coulter, of Detroit, Treasurer of the Association, reported that the Association's finances "are in good shape". He said that not a single resignation or a single protest had been received about the 25 per cent increase in dues voted at the Midyear Meeting, and declared that this showed the "well-founded interest" of the members in the Association.

The House voted to adopt Mr. Coulter's report.

Karl C. Williams, of Rockford, Illinois, was nominated for membership on the Committee on Scope and Correlation of Work. This is a Standing Committee whose purpose is to study the structure, function and work of the various Committees and Sections of the Association, with the duty of making recommendations to improve correlation of the work of the Association. The Committee is composed of five members, one elected by the House of Delegates each year. The By-laws require that the new member be nominated at the first session of the House during the Annual Meeting and elected at a later session.

Budget Committee

Robert K. Bell, of Ocean City, New Jersey, Chairman of the Budget Committee, reported that the Association had ended the fiscal year 1960 in the black, adding that "this was probably due to some extent to the fact that we are crowded in the headquarters and some of the programs that the Association would like to expand have not been promoted due to the fact that there is no place in Headquarters for additional staff members". Mr. Bell noted that the appropriation for the current year was $90,000 above last year's, but that it was expected that the dues' increase would cover this. He added that a large part of the Association's surplus was being used for the new wing at the American Bar Center. "While we think that this is a fine thing, at the same time we feel that the surplus should be built back to where it was a year ago", he said.

Rules and Calendar

Mr. Fitts, the Chairman of the Committee on Rules and Calendar, then presented five proposals for amending the By-laws of the Association. The first was as follows:

Article XI, Section 3, of the By-Laws shall be amended so that the same shall read as follows:

"No report shall be considered by the House of Delegates unless there shall have been compliance with the provisions of Sections 1 and 2 of this Article or unless compliance is waived by a two-thirds vote of the House of Delegates present at the meeting upon recommendation of the Committee on Rules and Calendar. Any Section or Committee desiring a waiver shall give written notice thereof and the reasons therefor to the Committee on Rules and Calendar at least ten days before the meeting of the House of Delegates at which it is to be considered, *and such waiver shall not be recommended by the Committee on Rules and Calendar unless action by the House of Delegates at its forthcoming meeting shall be desirable because of pending legislation or unless such action for some other reason shall be considered to be of sufficient importance to justify its consideration at the meeting.*"

Mr. Fitts explained that the object of the By-law was to prevent the late filing of reports by Sections and Committees without justifiable cause.

As originally worded, the words "of sufficient importance to justify its consideration at the meeting" read "of the utmost importance". The change was made on the motion of James L. Shepherd, Jr., of Houston, who argued that the first version was too restrictive. "There may be a great many matters that would not be considered of the utmost importance, and yet, because of their noncontroversial nature we might as well act on them at a given meeting", he said.

The proposal was adopted in the form suggested by Mr. Shepherd.

The next proposal offered by Mr. Fitts was intended to prevent dissemination of reports to the public except through the regular channels of the Association's Public Relations Department. It read as follows:

Article XII, Section 2, of the By-Laws shall be amended so that the same shall read as follows:

"No report, recommendation, or other action of any Section or Committee thereof, or of any Committee of the Association, shall be considered as the action of the Association unless and until it shall have been approved or authorized by the House of Delegates or by the Board of Governors. *No Section or Committee thereof, or any Committee of the Association, or any member of any such Section or Committee, shall release any report of such Committee or Section to the public before the same is distributed to the House of Delegates or the Board of Governors as required by Article XI of the By-Laws. This is not to be construed as limiting the customary news distributions of the Association through its Public Relations Department.* Any material containing any report, recommendation or proposal circulated by any Section or Committee thereof or by any Committee of the Association *or by the Association's Public Relations Department* shall have clearly indicated thereon that the same *reflects merely the personal views of the individuals proposing the same and* does not represent the view or action of the Association unless *and until* the House of Delegates or the Board of Governors shall have taken approving action with respect thereto."

In reply to a question of Charles W. Pettengill, of Greenwich, Connecticut, Mr. Fitts explained that it was often desirable to have matters to be considered publicly disseminated in advance of the meeting of the House, but there has often been confusion when full reports are issued to the press, and this in spite of the warning legend on each report that it does not represent the action of the Association until adopted by the House.

Judge Godfrey L. Munter, of Washington, D. C., moved to strike the sentence referring to the Public Relations Department. "I don't believe that that sentence has any business in any By-laws. It is simply explanatory. It doesn't add to the purpose of the amendment, and it always has been understood what the policy of the Association is", he declared.

Mr. Fitts said that his Committee was opposed to this change. If those words were omitted, he said, the Public Relations Department might be prohibited from having anything to do with the preparation of news releases, and this would leave the dissemination of news about the Association in the hands of outsiders.

Arthur VD. Chamberlain, of Rochester, New York, moved to strike the words "the customary" from the proposal. "They add nothing", he declared.

Mr. Fitts replied that his committee was opposed to this too.

In the end the House voted to adopt the proposal without the floor amendments.

Mr. Fitts then offered his third proposal to amend the Association's By-laws. It read as follows:

Article XIII, Section 4, of the By-Laws shall be amended so that the same shall read as follows:

"No appropriation shall be made for traveling expenses of any member of any Advisory Committee as such, nor shall any appropriation be made for the traveling or other expenses of any member of the Board of Governors or of the House of Delegates or of any Committee or Section *Council or Committee* that are necessary and appropriate to and arise out of attendance as such at the annual meeting of the Association. This section shall not apply to any paid employee of the Association."

He explained that this change was intended to eliminate some confusion that had arisen over expense accounts of members for the Annual Meetings. Under the present Article XIII, Section 4, of the By-laws, no member of the Association can have any of his expenses paid to the Annual Meeting unless he is an employee of the Association. This proposal was brought about by a situation in which a Section invited a member of Congress to address it. The Congressman was a member of the Association, but not of the particular Section. The change would permit payment of the expenses of an invited speaker, even though he belonged to the Association, so long as he was not addressing a Section or Committee of which he was also a member.

The proposal was approved without debate.

Mr. Fitts then presented a proposal to add a new Section 3 to Article VI, reading as follows:

Amend Article VI by adding a new Section 3 as follows:

"*Action upon Legislation.*

"(a) The House of Delegates may express its opinion on definitive legislation, and such expression of opinion shall encompass subsequent amendments or modifications which do not change the basic proposals.

"(b) The House of Delegates may express its opinion with respect to the basic purpose and effect of proposed

or pending legislation without the necessity of acting upon specific legislation.

"(c) When definitive legislation is proposed or opposed, there shall be provided a complete summary of the phase of the legislation under consideration together with the portions of the legislative bill under consideration for each member of the House of Delegates at the meeting of the House at which the report is to be considered; and if only excerpts of the legislative bill are made available, not less than five copies of the whole bill shall be available for use of the Chairman of the House of Delegates before the report is considered."

Mr. Fitts also offered this proposal:

Amend Article X, Section 7, by inserting after paragraph (j) thereof a new paragraph (k) as follows:

"*Federal Legislation.* This Committee shall include members of the Association in the Washington area, and shall, through the Washington Office of the Association, advise and aid sections and committees in the pronouncement or presentation of the position of the Association with respect to any proposed or pending legislation before the Congress of the United States."

Mr. Fitts explained that the present rules require fifty copies of a bill before it can be considered by the House. The purpose of the amendment was to make it possible for the House to endorse legislative policy without the necessity of acting upon specific legislation. The other proposal changed the Committee on Federal Legislation from a Special to a Standing Committee. Both these proposals were adopted after some debate in which James L. Shepherd, Jr., of Houston; Ben R. Miller, of Baton Rouge, Louisiana; Walter E. Craig, of Phoenix, Arizona; Edward L. Cannon, of Raleigh, North Carolina; Willoughby A. Colby, of Concord, New Hampshire; R. N. Gresham, of San Antonio, Texas; and Mr. Fitts participated. The new provisions of the By-laws are printed here in the form adopted by the House, which includes some minor amendments offered from the floor in the course of the discussion.

A proposed amendment to the Association's Constitution was made a special order of business for Thursday morning (see page 1236).

The House then elected the following officers of the Association for the year 1960-1961. These had been nominated by the State Delegates at the Midyear Meeting last February in Chicago:

President-Elect, John C. Satterfield, of Yazoo City, Mississippi; Chairman of the House of Delegates (for a two-year term), Osmer C. Fitts, of Brattleboro, Vermont; Treasurer, Glenn M. Coulter, of Detroit; Secretary, Joseph D. Calhoun, of Media, Pennsylvania. Mr. Coulter and Mr. Calhoun were elected to succeed themselves. David A. Nichols, of Camden, Maine; Charles W. Pettengill, of Greenwich, Connecticut; Edward W. Kuhn, of Memphis, Tennessee; and Edward E. Murane, of Casper, Wyoming, were elected to three-year terms on the Board of Governors from the First, Second, Sixth and Tenth Circuits respectively.

Lawyers in the Armed Forces

The House then turned to the report of the Committee on Lawyers in the Armed Forces, which was made a special order of business at that time. The report was made by the Chairman, John P. Bracken, of Philadelphia. Mr. Bracken said that a bill to provide incentives for younger men to remain in the Armed Forces would be offered in the 87th Congress, while another bill will be introduced to create a Judge Advocate General's Corps for the Navy, matching those of the Army and Air Force. He said that the Navy Judge Advocate bill became part of the legislative program of the Defense Department last year, thanks to J. Vincent Burke, Jr., of Pittsburgh, General Counsel of the Defense Department. On Mr. Bracken's motion, the House voted to continue the Committee.

Customs Law

The report of the Committee on Customs Law was given by J. Bradley Colburn, of New York City, the Chairman. Mr. Colburn said that no action in the 86th Congress was expected on the Customs Simplification Bill, which the House went on record as opposing last year. He promised to keep the members informed on further developments. He said that the Committee was studying the operations of the Tariff Commission and called attention to a report written by three members of the Commission on legal interpretation and statutory construction by the Commission over the years.

Economics of Law Practice

John C. Satterfield, of Yazoo City, Mississippi, Chairman of the Committee on Economics of Law Practice, whose report was taken up as a special order of business, said that corresponding committees had now been set up in all but three or four states. The proposal to set up a continuing survey of the legal profession was moving forward, he continued, and by February he hoped that it would be possible to report that the survey had been instituted. He also expected a report on the matter of setting up a Bureau of Economics of Law Practice, with full-time professional staff, in February, and he reported that the American Bar Foundation is conducting a study of restrictions on attorneys' fees under federal statutes, while an advisory committee is studying the feasibility of setting up courses in law schools on the business phases of the practice of law. On Mr. Satterfield's motion, the Committee was continued.

American Citizenship

Jerome S. Weiss, of Chicago, the Chairman of the Committee on American Citizenship, said that his Committee, along with the Committee on Atomic Attack and the Committee on Communist Tactics, Strategy and Objectives, had attended briefing sessions conducted by Defense officials of the Government. The theory of the briefing was that lawyers must be intelligently informed in order to fulfil their obligations as leaders in their respective communities. He also called attention to the naturalization proceedings to be held the next day and urged members to attend.

Federal Liens

Laurens Williams, of Washington, D. C., reporting for the Committee on Federal Liens, of which he is the Chairman, said that the Internal Revenue Service had made a comprehensive study of the legislation recommended by the Association at its 1959 Midyear Meeting and that it is expected that bills will be introduced in the next Congress.

He then proposed the following resolution which was adopted without debate:

Resolved, That the Committee on Federal Liens be continued as a Special Committee of the Association, and that it be directed to continue to urge the amendments set out in the Final Report of the Committee on Federal Liens approved by the House of Delegates, at its 1959 Midyear Meeting, or their equivalent in purpose and effect, on the proper committee or committees of Congress.

Income Tax

The report of the Committee on Income Tax—Submission of Amendment was received and filed. On motion of Thomas B. Gay, of Richmond, a member of the Committee, the House voted to continue it, with the provision that its further continuation after 1960-1961 be referred to the Committee on Scope and Correlation of Work for study and report. The latter provision was added by the Board of Governors and accepted by Mr. Gay.

Law Student Association

Richard J. Concannon, of Brooklyn, President of the American Law Student Association, reported briefly for that organization. He explained some of the law student association's activities, including the publication of the *Student Lawyer Journal* and the sponsorship, along with the Junior Bar Conference, of the Lawyer Placement Information Service at the Annual Meeting. He also said that the organization had played an important role in the formation of the new National Association of Law Placement Officers.

Selection of Federal Judiciary

Harold J. Gallagher, of New York City, the Chairman of the Committee on Nonpartisan Selection of the Federal Judiciary, made a progress report. He reported that the proposal to appoint a commission to suggest nominees for appointment to the federal bench had not made any progress because of opposition by the Attorney General, but he promised that the Committee would seek to attain this objective when the next Administration takes over. On his motion, the House voted to continue the Committee, again with the proviso suggested by the Board of Governors that its continuance past the next year be studied by the Committee on Scope and Correlation of Work.

Continuing Education

Churchill Rodgers, of New York City, Chairman of the Committee on Continuing Education of the Bar, said that the Committee had been in touch with the state bar associations to attempt to secure appointment of continuing education committees in states where they do not now exist. The Committee is also encouraging the employment of paid administrators, he reported.

American Law Institute

Harrison Tweed, of New York City, President of the American Law Institute, which is the co-sponsor of the Continuing Legal Education Program, said that the Joint Committee would meet in September and prepare a written report for the Midyear Meeting. He declared that "looking around the country, the cause of better education for lawyers is going well".

The meeting recessed at 12:05 P.M.

Second Session

The second session convened at 2:05 P.M. on Tuesday, August 30.

Traffic Court Program

On motion of Mr. Fitts, the report of the Committee on Traffic Court Program was received and filed.

Atomic Energy Law

William Mitchell, of Washington, D. C., Chairman of the Committee on Atomic Energy Law, reported that an Association-backed proposal for the Federal Government to relinquish some control of radioactive materials to the states had been enacted into law. The regulatory authority which the states may assume includes responsibility for rule-making, licensing, inspection, compliance and enforcement, he said.

He also reported on the results of hearings conducted by the Joint Committee on Atomic Energy of the Congress, which had held hearings on state workmen's compensation laws with respect to protection from radiation injuries. A number of proposals had been made to the Joint Committee for action by the Federal Government, he said, and his Committee felt that the suggestions were unwise and unnecessary at this time. "Our feeling is that the states should be given an opportunity to take such action as may be necessary to improve their own statutes with respect to workmen's compensation protection for radiation injuries" he declared. Accordingly, he offered the following:

Whereas, It has been suggested that the Federal Government might take over or impose federal sanctions upon the present state jurisdiction over workmen's compensation for radiation injuries, either by establishing a federal system of compensation benefits for radiation injuries throughout the United States; by withholding public contracts, imposing special taxes on licensees, or refusing to issue atomic energy licenses, in those states whose workmen's compensation laws do not meet certain minimum standards established by the Federal Government; or by providing grants-in-aid to those states whose compensation laws meet the federal standards; and

Whereas, The 86th Congress in 1959 passed Public Law 86-373, amending the Atomic Energy Act of 1954, as amended, with respect to co-operation with the states, and on April 11, 1960, the President wrote to the governors of the various states concerning the need to increase the functions and responsibilities of the states as a safeguard against centralization of government power in this country, mentioning particularly the authority contained in Public Law 86-373; and

Whereas, the workmen's compensation system should remain the responsibility of the several states and the respective states should be encouraged to amend their respective workmen's compensation statutes, where necessary, to provide adequate protection with respect to radiation and other types of injuries without resort to or sanction of any action in this respect at the federal level; and

Whereas, Amendments to the workmen's compensation laws of individual states which do not now provide adequate protection need not be made separately with respect to radiation injuries but preferably should be a part of a program for the general improvement of the workmen's compensation coverage consistent with the needs of the individual state;

Now, Therefore, Be It Resolved: That the present workmen's compensation jurisdiction of the states should be preserved, free from interference or coercion by the Federal Government, and the states should be given every encouragement to effect any necessary improvements in their own statutes, giving particular attention to any special need that may exist for more adequate protection against radiation injuries.

On Mr. Mitchell's motion, the House voted to adopt the resolution and to continue the Committee.

Correlation of Work

Edward G. Knowles, of Denver, Chairman of the Committee on Scope and Correlation of Work, discussed briefly the functioning of his Committee and explained some of the problems it faced.

Court Congestion

John Eckler, of Columbus, Ohio, Chairman of the Committee on Court Congestion, said that his Committee was continuing its efforts to alert lawyers to the problem of delayed litigation and to call their attention to possible solutions. The Committee has distributed over three hundred copies of the March issue of *Annals of Political and Social Science,* which contained an article on the problem and continues to receive requests for its publication, *Ten Cures for Court Congestion,* he said. On his motion, the House voted to continue the Committee.

Publications

The Committee on Publications' report was made a special order of business at this time. The report was given by Paul F. Hannah, of Waltham, Massachusetts, the Chairman. Mr. Hannah said that thirty cents of each dollar spent by the Association in fiscal year 1960 was spent on publications. He declared that a great deal of saving can still be made in the cost of the publications, saying that "Considerable improvement still can be made in the publications of the Association to make them more effective competitors for the limited reading time of the busy lawyers of America", and he added that the full value of the publications could not be achieved until adequate indexing and digesting techniques have been developed, and said that this was under consideration by the Committee and the American Bar Foundation.

Regional Meetings

The report of the Committee on Regional Meetings, which had also been made a special order of business, was presented by Chairman Thomas J. Boodell, of Chicago. Mr. Boodell reported on the Regional Meetings held in Memphis and Portland, Oregon, and called attention to the forthcoming meetings in Houston to be held in November, and Indianapolis next May. Plans call for meetings in Birmingham in November, 1961, he said, while Salt Lake City, Little Rock and Cleveland are being considered as sites for meetings in 1962 and 1963. The Association normally has two Regional Meetings a year, he explained, and experience has shown that planning must begin at least eighteen months ahead to assure maximum co-ordination with bar organizations in the regions selected.

Professional Ethics

James L. Shepherd, Jr., of Houston, Chairman of the Committee on Professional Ethics, reporting for that Committee, called attention to the fact that his Committee no longer considered complaints against lawyers—that is the function of the new Committee on Professional Grievances. "Our function is to give advisory opinions to members of the Association and to bar associations and their committees as to contemplated action", he said. "We do make one exception as to past conduct. If a state or local bar association wishes advice as to whether they should or should not proceed in a given case on past conduct, we will then consider that action and give an advisory opinion, but not at the instance merely of the lawyer himself or some other lawyer, or where it is in the form of a complaint."

Mr. Shepherd also called attention to the Committee's Opinion No. 294, dealing with the relation of lawyers with collection agencies. This opinion has proved highly controversial and has never been officially released. The Committee has tried to avoid a conflict with the Unauthorized Practice Committee, he went on, but the matter is now two years old and the Committee felt it should again call the attention of the House to it. He also reported that the question of lawyers appearing on television and radio in simulated trials has aroused great interest and is receiving study by the Committee. He declared that his Committee would soon have a report on the ethical aspects of the question.

On motion of C. Brewster Rhoads, of Philadelphia, the House voted to suspend Rule XII of the Rules of Procedure of the House so as to permit the visitors from the British Commonwealth to attend the meeting of the House the next afternoon, when the Connally Reservation was scheduled for debate.

Rights and National Security

On motion of George S. Geffs, of Janesville, Wisconsin, the Chairman, the House voted to continue the Committee on Individual Rights as Affected by National Security. The Committee's report was received and filed.

Federal Legislation

The Committee on Federal Legislation made a progress report, speaking through Robert W. Upton, of Concord, New Hampshire, the Committee Chairman. Senator Upton noted that his Committee has no original jurisdiction and exists to assist other Committees and Sections in obtaining enactment of the Association's legislative program. He reported that bills to increase the number of federal judges had been passed by both Houses of Congress, but it was not expected that the differences between the two would be ironed out at this session. In spite of earlier optimism, he said that it now seemed unlikely that the Smathers-Morton-Kehoe-Simpson Bill would be passed this session, although he was still optimistic about its chances in the 87th Congress.

Bill of Rights

Alfred J. Schweppe, of Seattle, Chairman of the Committee on Bill of Rights, reported for that Committee, calling attention to the Committee's written report containing a summary of its study of Supreme Court decisions

on the Bill of Rights. He also reported that the Committee was hoping to join with other Association groups in formulating a program of education in high schools and colleges on the Bill of Rights and the Constitution as contrasted with Communism.

American Medical Association

Frank C. Haymond, of Charleston, West Virginia, Chairman of the Committee To Co-operate with the American Medical Association, made a brief oral report. On his motion, the Committee was continued.

Federal Rules

Edward E. Murane, of Casper, Wyoming, Chairman of the Committee on Federal Rules of Procedure, moved that his Committee be continued. "Last year I requested that we be continued, as we had spent no money, we had held no meetings, we had made no recommendations, and we had done nothing" he observed. "Once again, I am privileged to report that your Committee has now completed two years of doing nothing." The Committee will now begin to function, he added, since the Judicial Conference of the United States has now appointed the various federal committees, and the Association Committee's job is to co-operate with them. The House voted to continue the Committee.

International Law Unification

Joe C. Barrett, of Jonesboro, Arkansas, Chairman of the Committee on International Unification of Private Law, said that the first tentative draft of its final report was now complete and he promised the final report at the Midyear Meeting of the House. On his motion the Committee was continued.

Communist Tactics

The report of the Committee on Communist Tactics, Strategy and Objectives, presented by the Chairman, Henry J. Te Paske, of Orange City, Iowa, contained several recommendations, the first of which was adopted by the House:

> *Whereas*, The need for understanding the true meaning of Communism and its methods, as contrasted by liberty under law as provided by the Constitution of the United States, has never been more real and urgent than now; and
>
> *Whereas*, It is of particularly vital importance that our youth should have an objective explanation of the true nature, sinister meaning, and ulterior purpose of Communism in contrast with our system of constitutional government, so that they may be alerted and be better able to deal with the world wide totalitarian system of Communism and thus preserve the freedoms of our American Heritage.
>
> *Now, Therefore, Be It Resolved:* That the American Bar Association recommend to state and local bar associations that they establish committees to conduct a program to provide addresses and literature to school assemblies and civic organizations to explain the nature, objectives and tactics of Communism, and its dangers to our rights and freedoms, and to contrast affirmatively the basic fundamentals of Communism with the liberties under the Constitution of the United States.

The Committee's next recommendation called for appointment of a Special Committee of the Association to implement the resolution. The Board of Governors proposed that this question be referred to the Committee on Scope and Correlation to study whether a Special Committee should be appointed or the existing facilities of the Association be used to implement the program, and the House voted to follow this recommendation of the Board.

The Committee's next resolution, calling for wide circulation of copies of its report, was referred to the Board of Governors to determine the extent of distribution.

Franklin Riter, of Salt Lake City, a member of the Board, declared that there was no hesitation about the substance of the report. "The Board has asked that at least a thousand copies be made available at Headquarters for distribution", he said. The problem was one of finances and a question of synchronizing the work at Headquarters. He urged members of the House to use their copies of the report "and make it the text of your public speeches for the next six months". "I know no greater function that this body can perform than to carry the message of this report to the man in the streets", he declared.

The final resolution recommending continuation of the Committee was adopted by the House.

Committee on Draft

The next item was a report by the Committee on Draft on a resolution proposed by Lewis F. Powell, Jr., of Richmond, dealing with similar subject matter. Mr. Powell's resolution called for "a required course devoted specifically to the study of Communism" in the "curriculum of every secondary school, public and private". The resolution went on to specify that the course meet "the highest academic standards of accuracy, thoroughness and scholarship".

Raymond F. Barrett, of Quincy, Massachusetts, the Chairman of the Committee on Draft, submitted the resolution to the House without a recommendation.

Mr. Powell, urging adoption of the resolution, said that it would "supplement in an effective way the resolutions submitted by the Committee on Communist Tactics". He declared that the textbooks now widely used in the schools deal lightly with Communism. "It is really incredible, when one reflects on it, that in 1960 in very few of our schools will one find specific courses dealing with the most pressing problem which confronts mankind", Mr. Powell declared.

Joseph D. Stecher, of Chicago, the Executive Director of the Association, said that it seemed to him that adoption of this resolution would be inconsistent with the action of the House in referring the Communist Tactics Committee's resolution to the Board of Governors. "This may cost a lot of money", he said. "I don't think the House of Delegates is prepared here today to determine whether the necessary funds are available to make the kind of distribution that either the Committee recommends or that Mr. Powell recommends."

Mr. Schweppe declared that while he was wholly in sympathy with the resolution, it dealt with a sensitive area, since school authorities might resent being told what they should put into the curriculum. "I am not sure that this is the right way to do it", he declared.

Mr. Powell replied that his resolution called for no distribution and that he was perfectly willing to leave the implementation of its program to later action. "I would regret very much seeing the House of Delegates . . . take any action in the year 1960 which might be construed as a sign of unwillingness to recommend . . . that appropriate education be provided on Communism", he declared.

Lyman M. Tondel, Jr., of New York City, said that he would like to see the "emphasis put in whatever we do on having such courses in the teachers' colleges".

Mr. Cannon, of North Carolina, declared that the House was getting into the area of academic freedom, and he urged that the matter should be referred for study. He was thoroughly in favor of distribution of the Committee's report, he declared.

Willoughby A. Colby, of Concord, New Hampshire, urged adoption of the resolution. The schools were reluctant to cover the material, he declared, but it is all-important that they do so if the nation is to survive.

The matter was then put to a vote and the motion to refer to the Board of Governors carried, 114 to 39.

Public Relations

Richard P. Tinkham, of Hammond, Indiana, Chairman of the Committee on Public Relations, reported briefly for his Committee. He said that the pamphlet on *Law and Courts in the News* had been a tremendous success and that 15,000 copies had been distributed so far. The purpose of the pamphlet is to acquaint newspapers and radio and television people with court procedure. The reports of the liaison committee with radio, television and motion pictures had also been very successful, Mr. Tinkham said, and he announced that the Committee hoped to find backing to make some motion pictures on legal subjects.

Media Awards

Mr. Tinkham reported for the Committee on Awards to Media of Public Information, of which he is also the Chairman. Between seventy-five and a hundred entries are received in the annual gavel award competition, he said, from newspapers, magazines, radio stations, television studios, and the program has rendered a good service. On his motion, the House voted to continue the Committee and change its name to "Committee on Gavel Awards".

President's Report

John D. Randall, of Cedar Rapids, Iowa, the President of the Association, then delivered his report. He announced that he had carried out the mandate of the House to urge both major political parties to pledge themselves to make non-partisan appointments to the federal bench, and he read the replies that he had received from Senator Kennedy and Vice President Nixon. He also reported on the regional meetings held during the year and his attendance at the meeting of the International Bar Association.

On motion of William B. Cudlip, of Detroit, the House voted to extend its good wishes to Vice President Nixon and its hope for his speedy recovery from a knee infection.

Judicial Selection

Glenn R. Jack, of Oregon City, Oregon, Chairman of the Committee on Judicial Selection, Tenure and Compensation, made a short oral report for that Committee. He said that the Committee were working on meetings for members of the press, members of political organizations and representative groups of laymen on the problem of judicial selection, similar to that held last November in Chicago.

Uniform Rules of Evidence

On motion of Assistant Secretary Richard H. Bowerman, of New Haven, Connecticut, the House voted to continue the Committee on Uniform Rules of Evidence for Federal Courts.

Lawyer Referral Service

Paul Carrington, of Dallas, Chairman of the Committee on Lawyer Referral Service, made a short oral report.

Clients' Security Fund

The House voted to continue the Committee on Clients' Security Fund on motion of Mr. Stecher.

State Legislation

William W. Evans, of Paterson, New Jersey, Chairman of the Committee on State Legislation, reported that the Committee had prepared a new manual to aid in its function of securing passage by the various states of the uniform acts prepared by the National Conference of Commissioners on Uniform State Laws. Many states are far behind in the enactment of uniform laws, Mr. Evans declared, and it was hoped that the manual would be a stimulus to more adoptions.

Corporate Lawyer's Program

On motion of Mr. Stecher, the House voted to continue the Committee on Corporate Lawyer's Program and to increase its membership to twenty.

Mineral Law Section

The report of the Section of Mineral and Natural Resources Law was received and filed.

Patent Commissioner

On motion of Mr. Bowerman, the Committee To Follow Litigation Against the Commissioner of Patents was discontinued since it had completed its function.

Patent Law Section

The report of the Section of Patent, Trademark and Copyright Law was received and filed.

The House recessed at 4:40 P.M.

Third Session

The third session of the House, which began Wednesday, August 31, at 2:10 P.M., was the most interesting of the meeting. Devoted almost entirely to a debate of the Connally Reservation, the gallery and press tables were packed with spectators and newspapermen. The Connally Reservation, which the Association went on record as opposing in 1947, is a provision inserted in the treaty by which the United

States accepted the jurisdiction of the International Court of Justice. The United States accepted the compulsory jurisdiction of the court except as to matters which are "essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*". The last eight words are the so-called Connally Reservation.

World Peace Through Law

Charles S. Rhyne, of Washington, D. C., a former President of the Association, the Chairman of the Committee on World Peace Through Law, reported for his Committee. He said that the Committee had received grants of $550,000 (largely from the Ford Foundation and the International Co-operation Administration) to carry on its work and said that most of this money will be used to promote the program of sponsoring conferences of lawyers throughout the world. One of these conferences will be held in Latin America in January, another in Africa in March, a third in Asia and a fourth in Europe. In 1962, there will be a world conference. Mr. Rhyne explained that the purpose of these conferences would be to exchange ideas on "how can we translate the great ideal of a world ruled by law into a reality?" Responses from all over the world, he declared, indicate "an ever-rising tide of interest and activity".

In reply to a question put by Mr. Cannon, Mr. Rhyne said that none of the money received by the Committee had been spent on the dissemination of information about the Connally Reservation.

On his motion the House voted to continue the Committee.

Peace and Law Committee

The House then turned to the Connally Reservation. The controversy had been raised at the Midyear Meeting by a resolution seeking to reverse the Association's thirteen-year-old stand in favor of withdrawing the reservation. That resolution had been referred to the Committee on World Peace Through Law, headed by Mr. Rhyne. The debate at this meeting was over the following report offered by that Committee:

> That the proposed resolution to rescind the American Bar Association's position urging repeal of the Connally Amendment which was referred to this Committee for study and report in February, 1960, is unsound in principle and experience and should not be adopted, and
>
> That the position of the American Bar Association favoring elimination of the Connally Amendment as contained in the resolution adopted on February 25, 1947, be reaffirmed.

The Committee on Peace and Law Through United Nations, under the chairmanship of J. Cleo Thompson, of Dallas, also presented a resolution dealing with the Connally Reservation, taking a stand directly opposite that of Mr. Rhyne's Committee. The House took up both these reports together.

Because of the peculiar parliamentary situation, the House adopted the motion of Roy E. Willy, of Sioux Falls, South Dakota, that each side be allotted one hour to present its case. Mr. Willy was to allocate the time for speakers favoring retention of the reservation and Ross L. Malone, of Roswell, New Mexico, was to allocate time for speakers opposing the reservation, in favor of the report of the Rhyne Committee.

Mr. Rhyne moved the adoption of that report, and was the first speaker for the anti-reservation faction.

Mr. Rhyne declared that his Committee had considered every argument advanced in favor of the reservation and that it could find none directed at the World Court itself or anything that the court has ever done. "They are directed more at some other agency, some other person, and some other opinion" he declared. "The court itself seems to be rather free from criticism insofar as its opinions are concerned."

President Eisenhower "and everyone having positions of responsibility in this field have all recommended that the Connally Amendment be eliminated" he continued. Their objection was to the self-judging aspect of the reservation. Thirty-three Free World nations have adhered to the World Court treaty without such clauses, he went on, "the Charter of the United Nations prohibits this court from having any jurisdiction over a domestic subject." He argued that never has the court handed down a decision that could even in argument be said to interfere with the domestic jurisdiction of any country. If the court should "go haywire", Mr. Rhyne continued, "we could also veto any enforcement measures of any unreasonable decision in the Security Council". He told the members of the House that they had "the greatest opportunity you will ever have in your whole life to move law forward to replace force as the controlling factor in the fate of humanity . . . If we go backwards on the Connally Amendment matter, our World Peace Through Law program, our Law Day programs will be ruinously destroyed."

Mr. Willy then moved that the Rhyne resolution be amended by striking the words "is unsound in principle and experience", "not", the word "and" and all of the second paragraph. Mr. Malone rose to a point of order on this, and the Chair ruled that the motion was out of order.

The debate resumed, with Mr. Thompson speaking in favor of retaining the reservation. He began by saying that the question was not one of preferring violent rather than peaceful means for settling international disputes nor was it an alternative between the Connally Reservation and nuclear war. He predicated his position on two postulates, he said: "(1) that a sovereign state should not bind itself in advance to submit to the jurisdiction of the International Court of Justice disputes or questions arising out of matters that are essentially domestic in character and (2) that there are not any established rules or principles of international law . . . whereby it can be determined whether a matter is essentially domestic or international in character".

Mr. Thompson said that the World Court was not a court as we are accustomed to the word in America. American courts are bound by precise statutes limiting their jurisdictions, specifying the type of cases they are to hear, monetary limits, and so forth. There is a provision for an appeal, and there is a provision for enforcement through the court's machinery. The

World Court has none of these attributes, Mr. Thompson noted.

As for the self-judging argument, Mr. Thompson declared "we lawyers in our daily practice constantly refuse to submit our clients to the jurisdiction of American courts—and we do so as a matter of law, as a matter of right, not privilege. We have a right to refuse to submit a client who resides in Texas to the jurisdiction of an American court in the State of New York." There was nothing immoral or unintelligent in declining to submit our domestic matters to the World Court, he declared.

Arthur H. Dean, of New York City, was the next speaker for those opposed to the Connally Reservation. He began by noting that under the U.N. Charter, the World Court has no jurisdiction over domestic affairs. The United States is the leader of the Free World, he said, and we are always telling the rest of the world that disputes ought to be settled by peaceful means. Under international law, he continued, the self-judging clause is reciprocal—other nations can insist that the matter is purely domestic if we bring them into court, even though they have no such provision. France had such a clause, Ambassador Dean declared, when she tried to bring Norway before the court on the question of payment of gold on Norwegian bonds floated in France. Norway used the French self-judging clause against France and insisted that the matter was purely domestic, and the World Court upheld her. Mr. Dean also said that Bulgaria had used our clause against us when nine Americans were shot down in an Israeli plane flying over Bulgaria.

David F. Maxwell, of Philadelphia, a former President of the Association, was the next speaker. He declared that it was not the Connally Reservation that stood in the way of an effective World Court: it was the fact that adherence to the court is voluntary, and the Communist nations have not accepted the court's jurisdiction. It is true, he went on, that now there are only two judges from Communist countries on the court, but there are nine other Soviet-dominated countries eligible to have judges appointed and there are thirty new nations asking for admission to the U.N.—once admitted, all of them would be eligible. Mr. Maxwell declared: "We should not be swayed by the 'do-gooders'. We should not be swayed by their wishful thinking or their idealistic dreams. We are in a practical world, and how can any court be called 'world' as long as almost a half of the world's population does not subscribe to it?"

John C. Satterfield, of Yazoo City, Mississippi, President-Elect of the Association, said that he had approached the question "with the prima facie feeling that the Connally Amendment should be retained" and that he had joined in the debate favoring it, but after reviewing the matter, he believed that we should stick to the position taken thirteen years ago. No action could be taken adverse to the United States, even in the event of an adverse decision by the World Court, he said, because we still have the veto power in the Security Council. He added that he doubted that it would ever be necessary to use this. "In reviewing the ninety-six times in the past when questions were raised involving matters before the court, it appears that twenty times the members of the court from the identical country involved have voted against the position of their own country", he stated.

Mr. Satterfield conceded that if we had to use our veto in the Security Council, we would be worse off than if we had resorted to the Connally Reservation in the first place, but he expressed confidence that the court would never attempt to invade our domestic jurisdiction. "If it ever happens, it will be years down the line, but if we retain the veto in the Connally Amendment, every day, every month, every year we tell the world that we, who advocate world peace through law, will not submit to the Court of International Justice adjudication of those things which affect us", he said.

Rignal W. Baldwin, of Baltimore, speaking in favor of retaining the reservation, said that if other nations do not have provisions similar to the Connally Reservation, they have safeguards to protect their domestic affairs from World Court jurisdiction. For example, he said, the United Kingdom has reserved the right to terminate its adherence to the court "at any time". The United States is bound for six months. The United Kingdom will not permit suit against it in the court by a party who has not been an adherent to the court for at least twelve months. The French have a provision under which they can withdraw their adherence merely by giving notice, and further they have a provision excepting from World Court jurisdiction "disputes arising out of a crisis affecting the national security", Mr. Baldwin said. "Do not repeal the Connally Amendment", he pleaded, "without, unless and until some satisfactory national security addition, restriction, amendment or condition is added, such as England and France have."

William T. Gossett, of Dearborn, Michigan, speaking for repeal of the reservation, said that the issue was not whether we should have safeguards to protect the sovereignty of the United States, but whether we should retain the self-judging Connally Reservation. He argued that we should not wait until Russia becomes a peaceful law-abiding nation. "Is the cause of international justice Russia's cause or is it ours?" he asked. "Leadership necessarily involves some risks, but is it any less risky to lag behind Russia, the one world power that has demonstrated absolute lack of respect for international tribunals?" The reservation "is founded in suspicion and rooted in inordinate fear of risk", Mr. Gossett declared. "Human progress . . . has never been advanced one iota by yielding to suspicion."

Frank E. Holman, of Seattle, former President of the Association, who had been a member of the Association's Committee on Peace and Law when it first considered the matter in 1947, said that he had changed his opinion because the United Nations had ignored its Charter provision prohibiting invasion of the domestic affairs of member nations. Mr. Holman pointed to the Genocide Convention, the Declaration of Human Rights and the Covenant on Human Rights. "Every one of them absolutely wrote out of the Charter these protective provisions", Mr. Holman declared. "Point to a single organ in the United Nations that has ever paid even lip service, or a

single official of the United Nations that has ever paid even lip service to that provision in the Charter", he challenged.

Robert G. Storey, of Dallas, former President of the Association, denied that the opponents of the reservation were in favor of world government. "It is not necessary to have a world government to have an international court of justice", he declared. Treaties are sacred contracts between nations, he went on, and the trouble has been that we have not had an effective court or an effective arbiter in disputes when one nation wants to hide behind its sovereign privileges. "I think we ought to do our best, regardless of what the Soviets do . . . to set up a workable court of justice for settling international disputes, and this is an essential part of the rule of law which we have undertaken."

The next speaker was Alfred J. Schweppe, of Seattle, speaking in favor of retaining the reservation. Mr. Schweppe said that the objective of world peace could be furthered even with the retention of the reservation. This might be done, he suggested, "through urging an increase in the voluntary submissions to international tribunals until a greater confidence is built up . . . comparable to that which existed during the years of the Hague conventions around the years 1909 and 1910". He was deeply concerned, he went on, over the argument "Let's get in because we have the veto power." "It seems to me", Mr. Schweppe continued, "to debate on the floor of this House that we shall take the leadership in the development of world law and accept the judgments of the World Court with a thought in the background that we can repudiate any judgment that we don't like is a position in international morals to which I for one cannot subscribe." Furthermore, there was no established law for the court to follow, Mr. Schweppe continued. He quoted from a State Department pamphlet prepared in 1950 which contained the statement: "There is no longer any real difference between domestic and foreign affairs." "Now what is a world court which has the problem of adjudicating whether a certain question is an internal affair of the United States or not—what is it to do in the face of a statement by the State Department that all questions have international implications and there is no longer any real difference?" Mr. Schweppe asked.

Proponents of withdrawal, Mr. Schweppe concluded, credit the court with having stayed within its jurisdiction so far. "I think we ourselves have experienced in this country on numerous occasions the experience that judicial self-restraint does not work", he said. "It has not worked in many areas. The definition of interstate commerce has been changed so that John Marshall wouldn't recognize it. The definition of states' rights has been judicially changed."

Albert E. Jenner, Jr., of Chicago, argued that the reservation unwittingly supplied the means by which Russia and the Communist bloc could raise the Iron Curtain. Russia has not accepted the compulsory jurisdiction of the court, he said, and so is on a day-to-day basis if cases arise against it in the court. We are on the same basis, except that where Russia says "No", we say "Maybe". He argued that this may cause the uncommitted nations of the world to say to us: "At least Russia is frank. It has not accepted compulsory jurisdiction of the Court. And you expect us to accept it while at the same time out of the other side of your mouth you are saying 'We will accept the jurisdiction after we take a look at the case you are presenting to us'."

Let us repeal the reservation, Mr. Jenner urged, and expose Russia as a rejecter of the principle of peaceful means of settling disputes. If we do, "Russia will soon accept the jurisdiction of the International Court of Justice in order to protect herself from the condemnation of public opinion of the entire world" he predicted.

Another Chicagoan, Barnabas F. Sears, was scornful of the idea that "we block world peace because we do not agree to permit an elective court of fifteen judges, of diverse nationalities, faiths, cultures and political and juristic predispositions, not one of whom must be a lawyer, to decide whether a question is or is not within that domestic jurisdiction". "Are we to entrust the destiny of men to a judicial oligarchy, a bevy of Platonic guardians?" he asked. "We ignore history in our blithe assumption that all of our domestic questions are ultimately susceptible of resolution by the judicial process, let alone international ones. . . . Did a courtroom settle the right of secession?" he asked. "Did the United States Marshall enforce the decree at Little Rock? Have we thoroughly thought through what a doctrine of judicial supremacy might do to the peace of the world?"

Whitney North Seymour, of New York City, the incoming President of the Association, declared that this was simply a question of lawyer's judgment. "What has happened since 1947 that indicates that in the interests of the United States . . . we should shift our ground and reverse our position?" he inquired. There was nothing in the decisions of the court to indicate that a change of position was required, he continued. "The decisions are the decisions of an international court composed of people behaving like judges, not the decisions of a political institution." The only thing that has happened, he went on, is that the Cold War has gotten colder and more dangerous. "Should that cause us to retreat?" he asked. Mr. Seymour concluded by saying: "I think we ought to assert that the Bar is to take the lead in the Free World and to show American leadership in the Free World."

Loyd Wright, of Los Angeles, a former President of the Association, declared that he had asked advocates of repeal of the reservation to show him a single case where the Connally Reservation had interfered with the United States submission of cases to the court. They haven't done so, he declared. Mr. Seymour asks what has happened to cause us to change our position since 1947, he went on: "I will tell him: Tibet, Hungary, Cuba, the Summit, the Japanese peace strikers over in Japan that cancelled the President's visit."

Mr. Malone, another former President of the Association, closing debate for his side, declared that this would be "the issue which will have the greatest impact upon the Association of any which we have decided". The Senate was watching, other government officials were watching to see

what stand the Association would take, he said. The country at large has looked to the Association as having provided leadership toward the rule of law, he argued. How could we explain why the Association reversed a thirteen-year-old position immediately before empanelling a meeting of the lawyers of the world to discuss the application of law to world problems? It would do irreparable damage to our position, Mr. Malone declared. "What we do here today is going to speak far louder than what we say in any international conference that we sponsor" he concluded.

Cody Fowler, of Tampa, Florida, a former President of the Association, declared that many lawyers believed that the judge you get in a trial and the panel you get, does affect the decision. He quoted Sir Leslie Munro to the effect that judges of the World Court have generally supported the contentions of their own country. The American people, Mr. Fowler said, "don't want any more American rights given away".

James D. Fellers, of Oklahoma City, declared that he had been willing to chance an impairment of our sovereignty in 1947, but he had now changed his mind. Timeliness was the key to the problem, he said, and this was the wrong time to repeal the reservation, when there are six vacancies on the court to be filled soon and thirty new members of the United Nations from which appointments might be made.

Frank W. Grinnell, of Boston, declared that independent thinkers ought to use their judgment—and using judgment meant challenging earlier ideas. He was for repeal of the Connally Reservation in 1947, he said, but since then "I have been thinking, challenging my own thinking, and I changed my mind."

Kirk McAlpin, of Atlanta, said that the Connally Reservation had been debated by the Junior Bar Conference and that Section was of the opinion that the 1947 position of the Association should not be disturbed.

Mr. Willy, summing up for those who favored the reservation, said that any movement that tended to jeopardize our sovereignty and the strength of our political institutions was a threat to the peace of the world because we were the leaders of the Free World, which depend upon us.

James D. Carpenter, of Jersey City, asked how we could expect the world to submit questions to the World Court when we were afraid to submit questions that concern us. Repeal of the reservation "will kill the lies of the Kremlin that we are warmongers", he declared.

John D. Randall, of Cedar Rapids, Iowa, the President of the Association, then took the floor to propose a compromise resolution. He suggested that the United States' declaration accepting the compulsory jurisdiction of the Court be made for a period of three years and thereafter until six months after notice was given that it was to terminate, and that the Connally Reservation be withdrawn insofar as disputes between the United States and the members of the NATO alliance were concerned.

Mr. Rhyne said that he and Mr. Holman were in agreement that this proposal was impossible under the U.N. Charter, and furthermore, Mr. Rhyne said, would be a "terrible affront" to friends of the United States in Latin America and elsewhere.

Mr. Holman declared that Mr. Randall's proposal "would be the most divisive sort of approach to the World Court that could possibly be made. It would be an invitation to Russia, for example, to come in with an acceptance making all kinds of reservations as to the free countries, but being perfectly willing to litigate among the Communist countries", he said.

Mr. Willy declared that the proposal would involve changing the whole basic order of a structure that we have spent ten years building, without giving it any consideration. That would be a "serious reflection on the intelligence of the American Bar Association and this House of Delegates" he said.

A vote was then taken on Mr. Randall's substitute resolution, and it was defeated.

A vote was then taken on Mr. Rhyne's resolution affirming the Association's 1947 stand in opposition to the Connally Reservation, and the resolution was approved by the narrow margin of 114 to 107.

Attorney General Rogers, who was present, said a few words of greeting, and the House recessed at 5:10 P.M.

Fourth Session

The House reconvened at 9:40 A.M. on Thursday, September 1.

Karl C. Williams, of Illinois, was elected to membership on the Committee on Scope and Correlation of Work.

Amendment of Constitution

The next order of business was consideration of an amendment to the Association's Constitution, providing that the District of Columbia should be treated as a separate Circuit for the purpose of electing members of the Board of Governors. At present, the District is considered a part of the Fourth Circuit. The Board of Governors consists of the officers of the Association, the last retiring President, the Editor-in-Chief of the *Journal*, and members elected for three-year terms from each of the ten Judicial Circuits.

Francis W. Hill, of Washington, D. C., one of the sponsors of the proposed amendment, declared that the sponsors were not seeking any special privilege for the District. "We merely seek to set aside the discrimination which has been made against the Circuit for the District of Columbia and for the Fourth Circuit", he said. The District of Columbia was an important Circuit, he argued, and it has more judges than most of the other Circuits. Mr. Hill said that it was "unfair" for the Association not to recognize the District as a separate Circuit, and he pointed out that there were 3,697 Association members in the District, almost as many as in the First Circuit, which has 3,764 Association members.

Mr. Miller, of Louisiana, spoke in opposition to the proposal. The House of Delegates is supposed to be a representative body, he said. The result of this amendment would be to give the District a permanent representative on the Board. The District is already amply represented, he argued, since it has nineteen members in the House of Delegates. He pointed out that it is the custom to rotate vacancies on the Board among the states in a circuit,

and the District is grouped with the Fourth Circuit, which has one of the smallest number of states in it. "In many Circuits, there are as many as seven and eight and even nine states sharing a Board of Governors member", Mr. Miller declared. Many cities have as many members of the Association as the District of Columbia, and the District, when ranked among the states, is forty-eighth in percentage of lawyers belonging to the Association. The proposal "cannot be justified on any basis of representation of the American lawyer", he said, "and I sincerely hope that this House will feel, as I do, that, in fact, the District of Columbia is probably over-represented now."

Richard W. Galiher, of Washington, D. C., said that the District's low-ranking percentage-wise was the result of including all the Government lawyers in the District in the figures for the District, whereas many of them retain their affiliation with their own state organization. The District was a Circuit, he argued, and should be treated as one.

John C. Satterfield said that he did not think there was any danger that some other city might ask for the same treatment. "The justification therefor from the viewpoint of our Constitution and By-laws is that it is a Circuit", he said. Furthermore, he declared, "in practice and type of practice in the District of Columbia, there are problems of law, there are questions of law, there are phases of the practice, which it would be proper to have represented by their own chosen representative to be expressed on the Board of Governors." He said that he could see no inequity in this Circuit's having continuous representation, just like any other Circuit.

Charles W. Pettengill, of Connecticut, moved that the proposal be referred to a Special Committee appointed to examine the whole structure of the Association's Constitution and By-laws. There were many things that should be examined, he said—perhaps there should be one or two members of the Board at large. Perhaps the Chairman of the House should serve a one-year term instead of two, or perhaps the President-Elect should be the House's presiding officer.

Mr. Hill replied that his proposal was a simple one that did not require any consideration by way of reference.

Mr. Satterfield agreed. "This is a problem which does not require long, mature consideration", he said.

William A Sutherland, of Atlanta, agreed with Mr. Satterfield and Mr. Hill. "It seems to me it would be very helpful to the Board of Governors to have always on the Board of Governors a representative from the District of Columbia", he said.

Harold J. Gallagher, of New York City, was in favor of Mr. Pettengill's motion. The Circuits are too illogically divided to be the basis for determining Board membership, he suggested. The whole problem ought to be restudied.

Colin MacR. Makepeace, of Providence, agreed. There are other matters of structure that should be restudied, he said, pointing out that Rhode Island has had only one member of the House for the last two meetings because the present provision makes it impossible to appoint a new State Delegate until the next regular election when a State Delegate resigns.

Mr. Rhyne declared that it was "awfully important that a member of our official family be located here [in Washington]... I think if we had a member of the Board of Governors here, who could be called upon to speak for the Association, when other Chairmen of Sections and Committees and when the President could not get here, it would be a tremendous aid to our Association", he said.

Whitney North Seymour, of New York City, said that there was much logic in the proposal that the District have representation on the Board of Governors, but he also thought that the whole structure needed to be studied, so he favored the referral. He added that he hoped that the Special Committee would "look in the most sympathetic possible way on the proposal that the District should have a representative on the Board of Governors".

Cloyd LaPorte, also of New York City, pointed to another problem for the Special Committee. The Second Circuit is composed of New York, Connecticut and Vermont. New York has 37,110 lawyers, Connecticut 3,182 and Vermont 422. Under the present system, the representation on the Board is rotated regularly among these three states, so that New York, with nine times as many lawyers, has a member on the Board only three out of nine years.

Carl B. Rix, of Milwaukee, said that this problem had been carefully studied when the present Constitution was adopted, and he pointed out that there are many members of the Bars of Virginia and Maryland who are also members of the Bar Association of the District of Columbia. That should also be studied by the Committee, he declared.

A vote was then taken, and the motion to refer the matter to a Special Committee carried, 126 to 55.

Professional Relations

On motion of Dean Erwin N. Griswold, of Cambridge, Massachusetts, the Chairman, the House voted to continue the Committee on Professional Relations.

Revision of Canon 35

Whitney North Seymour, of New York City, Chairman of the Committee on Proposed Revision of Canon 35, made a brief progress report.

Federal Judiciary

Bernard G. Segal, of Philadelphia, Chairman of the Committee on Federal Judiciary, reported for the Committee. He said that no action was expected on the Omnibus Judgeships Bill, although both the Senate and the House had passed different versions of it. He had no doubt that the next Congress would pass the bill, he declared. "The question is not whether, the question is when. It is of the utmost importance that the legislation get a priority when the new Congress convenes." He said that during the past year, the Committee had investigated and reported on the names of sixty-four persons being considered for appointment to the Federal Bench, and he declared that the Association's liaison with the Department of Justice "stands at the highest peak in the history of the Association". He gave particular credit to Attorney General Rogers and Deputy Attorney General Walsh for this, along

with President Eisenhower. He also pointed out the Association had been successful in getting a plank in the Republican Party Platform calling for appointment of judges on a non-partisan basis.

Mr. Segal then moved adoption of the following, which was approved without debate:

Whereas, A qualified and independent judiciary is indispensable to the protection of the freedom and rights of every individual,

Whereas, The House has acted heretofore and under its instructions, the President of the American Bar Association, has presented the views of the House of Delegates of the Association to the candidates;

Whereas, The election of a President of the United States will occur on November 8, 1960, be it

Resolved, That the incoming President of the United States be urged to nominate for appointment to judicial office only the best qualified lawyers or judges available, without regard to their political affiliations;

Resolved Further, That the incoming President of the United States be urged to continue the program presently in effect under which:

(1) The Attorney General of the United States refers to the American Bar Association, through its Standing Committee on Federal Judiciary, the name of each person who is under consideration for nomination as a judge in a federal court, so that the Committee may report to the Attorney General on the qualifications of such person;

(2) The President of the United States does not nominate as a federal judge any person who, after thorough investigation and consideration, is, for valid reasons, reported by the Standing Committee on Federal Judiciary as not qualified to serve as a federal judge;

Resolved Further, That after the election, the Secretary of the Association forward copies of this resolution to the incoming President of the United States, and to his appointee as Attorney General of the United States.

The second paragraph was inserted at the suggestion of the Board of Governors.

Deputy Attorney General Walsh then addressed the members of the House briefly.

Admiralty and Maritime Law

On motion of Arthur M. Boal, of New York City, the House voted to adopt the following recommendation of the Committee on Admiralty and Maritime Law:

Resolved, That the functions of the Standing Committee on Admiralty and Maritime Law, as recommended by that Committee in its annual report, be considered by the Committee on Scope and Correlation of Work, in the light of the work of other organizations in the admiralty field, with a view towards restating the same so as to be more explicit and to avoid duplication of effort with other bar organizations especially interested in admiralty law.

Junior Bar Conference

Gibson Gayle, Jr., of Houston, Texas, made a brief oral report for the Junior Bar Conference.

Section of Family Law

Godfrey L. Munter, of Washington, D. C., the Delegate of the Section of Family Law, reported that the Association-endorsed bill to provide certain safeguards in cases of proxy adoptions of children in foreign countries had not been enacted, but that the Section would continue to follow developments in the new Congress.

Agency Appointments

On motion of Secretary Calhoun, the House voted to continue the Committee on Administrative Agency Appointments for one more year and referred the question of its further continuance to the Committee on Scope and Correlation of Work.

Section of Taxation

David W. Richmond, of Washington, D. C., the Delegate of the Section of Taxation, said that the Section had a number of proposals for technical amendments to the internal revenue laws that would be presented at the Midyear Meeting. He said that the Section had studied the resolution referred to it by the House in 1959 at Miami recommending a credit of 30 per cent on personal income tax returns for tuition and fees paid to institutions of higher learning. The Section was prepared to recommend that the proposal not be adopted, Mr. Richmond said, but since the Section had taken it up only that week, it wanted to consider the matter further.

On his motion, the House voted to defer action on the matter until the Midyear Meeting.

Legal Services and Procedure

On Mr. Calhoun's motion the House voted to adopt the following proposal of the Committee on Legal Services and Procedure:

1. That the Special Committee on Legal Services and Procedure be continued for another year; and
2. That the Ad Hoc Committee on Legal Services in the Defense Department be abolished.

The resolution is printed here in the form it was adopted, including a slight change in wording suggested by the Board of Governors.

Section of Insurance Law

George E. Beechwood, of Philadelphia, Delegate of the Section of Insurance, Negligence and Compensation Law, offered the following resolution:

I.

That the American Bar Association continue to oppose legislation substantially similar to the Forand Bill (H. R. 4700—86th Congress) as recommended by the Standing Committee on Unemployment and Social Security.

II.

That the policy of the American Bar Association on alternatives to Forand-type legislation be determined by the following principles:

1. If the voluntary insurance prepayment plans are reasonably available to those who desire them, the medical care of the aged can be adequately financed thereby, supplemented by old-age assistance and existing state, county, and municipal programs.

2. If, however, a new government program becomes imperative, a state program would be preferable to a joint federal-state program, and a joint federal-state program would be preferable to a federal program.

3. If a new government program of medical care of the aged is initiated, a program more closely resembling grants-in-aid for old-age assistance would be preferable to an extension of old-age and survivors insurance.

4. It would be desirable to include in any program of medical care for the aged that becomes imperative provision for "contracting out" or administration through such prepayment and insurance organizations as Blue Cross-Blue

Shield, group practice plans, and private insurance companies.

5. It would be desirable to make any government program of medical care for the aged that becomes imperative optional rather than compulsory for the aged individual.

The Board of Governors had recommended that this proposal be referred to the Committee on Unemployment and Social Security, but the House voted to adopt the resolution after Earl F. Morris, of Columbus, Ohio, the Chairman of that Committee, stated that his Committee had already seen the report and approved it.

The first and second subparagraphs of Paragraph II were amended on the floor of the House at the suggestion of Mr. Miller, of Louisiana, whose suggestions were accepted by the Section.

Unemployment, Social Security

Mr. Morris then made a progress report for the Committee on Unemployment and Social Security.

Section of Legal Education

The report of the Section of Legal Education and Admissions to the Bar was presented by John M. Allison, of Tampa. He offered the following which was adopted without debate:

Whereas, The Oklahoma City University School of Law of Oklahoma City, Oklahoma, has applied for provisional approval by the American Bar Association, and an inspection of the school shows that the school operates in compliance with the standards for legal education of the American Bar Association;

Now, Therefore, Be It Resolved, That the American Bar Association grants provisional approval to the Oklahoma City University School of Law, subject to annual inspections at the expense of the school, until full approval be granted.

Retirement Benefits

F. Joseph Donohue, of Washington, D. C., Chairman of the Committee on Retirement Benefits, said that he had hoped until the last minute that Congress would pass H.R. 10, The Smathers-Morton-Kehoe-Simpson Bill, permitting self-employed persons to obtain pension benefits, but it appeared that the Congress would not act at this session. He said that Senator Byrd, who had originally been opposed to the measure, had been persuaded to hold hearings on the bill and was now in sympathy with it. The bill was reported out of the Committee, but apparently would not be enacted. Mr. Donohue declared that he hoped for final passage during the 87th Congress.

The reports of the Section of Judicial Administration, the Committee on Membership, the Section of Criminal Law and the Board of Governors were received and filed.

Administrative Law Section

The Section of Administrative Law recommended the following, which was offered by John W. Cragun, of Washington, D. C., the Section Delegate:

Whereas, The Section of Administrative Law has further studied the problem of facilitating the orderly conduct of oral argument before agencies on the review of trial-examiner reports in cases of adjudication by limiting the participation in the oral argument phase of agency proceedings to those persons who appear as counsel of record;

Whereas, The problem above stated is understood to be one that is prevalent to a substantial extent in the oral argument of cases before the Civil Aeronautics Board, and that agency is presently considering a revision of its rules of practice designed to effect the orderly, fair and expeditious conduct of hearings before the Civil Aeronautics Board including the oral argument of cases;

Resolved, That it is the view of the American Bar Association that, as a general principle in the fair conduct of cases determining the rights of parties in particular proceedings, the opportunity for oral argument of cases on review of exceptions to trial-examiner initial decisions should be limited to attorneys whose appearances on behalf of parties are of record in the proceeding.

Resolved Further, That the Section of Administrative Law be and is hereby authorized to act for and on behalf of the Association in urging the adoption of rules of practice in conformance with the above stated principle.

The House voted to adopt the resolution after a brief discussion in which Earl W. Kintner, the Chairman of the Section, urged the House to approve the recommendation.

Committee on Legal Aid

Edward W. Kuhn, of Memphis, the Chairman of the Committee on Legal Aid Work, made a progress report for that Committee. He reported that while the number of legal aid officers has increased, the country's growing population thrusts upon the legal profession a continuing burden of expanding legal aid facilities. There are 130 cities in the nation with a population of more than 100,000, he said, and fourteen of them do not have legal aid facilities, while there are twenty-one cities in the 75,000-100,000 population group without legal aid offices. In addition, improvements must be made in cities where the legal aid facilities are substandard. He declared that a vast amount of work remains to be done and that the Association must consider a "new and broad development program".

Committee on Atomic Attack

The report of the Committee on Atomic Attack was continued on the motion of J. Garner Anthony, of Honolulu, the Chairman.

Unauthorized Practice

F. Trowbridge vom Baur, of Washington, D. C., the Chairman of the Committee on Unauthorized Practice of the Law, made a brief progress report. He called attention to a recent New Jersey decision where the state bar association won "a sweeping victory" against a trust company. The New Jersey court held that the prohibition of unauthorized practice was in the public interest, and served to protect the unwary and the ignorant from injury at the hands of unskilled persons; it held that no statute could constitutionally authorize the practice of law by persons not admitted to the Bar; and, third, it held that no corporation could engage in the practices that amount to unauthorized practice of law as an incident to its lawful business. Mr. vom Baur called this a highly important decision. He also discussed other developments in various parts of the country.

International Law Section

Lyman M. Tondel, Jr., of New York City, the Delegate of the Section of International and Comparative Law, offered the following, which were adopted after a brief debate:

I.

Finding that Article 6 of the statute of the International Court of Justice, adopted by the United Nations, contains the following provision relative to nominations by the national groups in the Permanent Court of Arbitration for election to the International Court of Justice:

"Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law."

Recognizing as we do the contribution that has been made to the selection process of our federal and state judiciary by the expression of views by national, state and local bar associations respecting the fitness of prospective holders of judicial office, and

Conscious of the great value to the United States of assuring United States representation on international judicial and legal bodies by persons of the highest personal and professional qualifications, including special training in international law,

Accordingly, It Is Resolved, By the American Bar Association, acting through its House of Delegates, that it recommend:

(a) to the persons entrusted with the nomination on behalf of the United States of Judges of the International Court of Justice that in making such nominations, they consult the United States Supreme Court, leading professors of international law in this country's law schools, and national associations (or the appropriate sections or committees of such associations) of recognized standing in the field of international law.

(b) to the Government of the United States that it make similar consultations in making nominations or appointments to other bodies requiring a high degree of competence in international law such as the International Law Commission of the United Nations, the United National Administrative Tribunal, and international commissions with judicial or arbitral functions of which the United States is a member.

II.

Resolved, That the American Bar Association recommend to the President and the Congress that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards be ratified by the United States:

Be It Further Resolved, That the Officers of the Association be directed to urge upon the proper Committees of Congress amendment to the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* dealing with contracts of arbitration and awards which are subject to the applicable arbitration provisions of any treaty of the United States; and amendment to the Judicial Code, conferring original jurisdiction on federal district courts over any arbitration contract or award which is subject to the applicable arbitration provisions of any treaty of the United States, without regard to the amount involved in the controversy or the citizenship of the parties to the proceeding, or the equivalent amendments in purpose and effect, as follows:

Section 1. Section 9 U.S.C. 2 is amended to read as follows (new matter in italics):

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce, *or a contract which is subject to the applicable arbitration provisions of any treaty of the United States*, to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as existed in law or in equity for the revocation of any contract."

Section 2. Section 9 U.S.C. 9 is amended to read as follows (new matter in italics):

"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year, after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award is made, *or, where the award was made abroad and is subject to the applicable arbitration provisions of any treaty of the United States, then such application may be made to the United States court in and for the district which has jurisdiction over the person sought to be held or his property.* Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action, in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."

Section 3. Section 9 U.S.C. 10 is amended to read as follows (deleted matter in small capitals and new matter in italics):

"In [EITHER] any of the following cases the United States court in and for the district wherein the award was made, *or the United States court in and for the district which has jurisdiction over the person sought to be held or his property under an award made abroad which is subject to the applicable arbitration provisions of any treaty of the United States*, may make an order vacating the award upon the application of any party to the arbitration—

"(a) Where the award was procured by corruption, fraud, or undue means.

"(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or if any other misbehavior by which the rights of any party have been prejudiced.

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

"(f) *Where an award made abroad may be refused recognition or enforcement on any other ground specified in the arbitration provisions of any treaty of the United States.*"

Section 4. Section 28 U.S.C. 1337 is amended to read as follows (new matter in italics):

"The district courts shall have original jurisdiction of any civil action or proceedings arising under any act of

Congress regulating commerce (*including any transaction or contract which is subject to the applicable arbitration provisions of any treaty of the United States*) or protecting trade and commerce against restraints and monopolies."

Section of Bar Activities

Russell E. Booker, of Richmond, Delegate of the Section of Bar Activities, made a brief progress report for the Section.

Section of Real Property

On motion of J. Stanley Mullin, of Los Angeles, the House voted to approve an amendment of the Section's By-laws whereby the Council of the Section would have authority to act for the Section between Annual Meetings.

Rights of Mentally Ill

The House voted to continue the Committee on Rights of the Mentally Ill on motion of Assistant Secretary Bowerman.

Uniform State Laws

George R. Richter, Jr., of Los Angeles, President of the National Conference of Commissioners on Uniform State Laws, made a progress report for the Conference. On his motion, the House voted to approve the Uniform Act on Patents, the Uniform Securities Ownership by Minors Act, the Uniform Testamentary Additions To Trust Act and an amendment to the Uniform Acknowledgement Act.

The House recessed at 12:05 P.M.

Fifth Session

The House convened for its fifth and final session at 9:35 A.M. on Friday, September 2.

The first business taken up at this session was the resolution that had been passed the day before by the Assembly, favoring an amendment to the Federal Constitution to permit the District of Columbia to have representation in the Electoral College (see the October issue of the *Journal*, 46 A.B.A.J. 1082).

Franklin Riter, of Salt Lake City, moved that the matter be deferred until the Midyear Meeting, but this was ruled out of order.

Ashley Sellers, of Washington, D. C., then moved that the House concur in the action of the Assembly.

Mr. Cannon, of North Carolina, spoke in opposition. "Yesterday in the Assembly we witnessed a spectacle which I have never witnessed before", he declared. "The Resolutions Committee . . . pointed out the provisions of the Constitution relative to the adoption of any such resolution, and furthermore there was very grave question as to the parliamentary procedure and as to the legitimacy of the new resolution, which was not a resolution, but merely a resolution on top of a resolution." At any rate, Mr. Cannon said, "the District of Columbia seemed to have enough votes here in the Assembly at that particular time to carry this motion". Even some of its sponsors admit that it was illegitimate, he said.

Loyd Wright, of Los Angeles, raised the point of order that the resolution dealt with a political matter.

Mr. Anthony, of Honolulu, declared that the same point had been raised when the question came up of the Association going on record as favoring statehood for Hawaii. That had been ruled out of order once, he said, but the House later reversed itself.

The Chair then ruled that the resolution was not merely political and that it was within the scope of the Association's purposes.

Mr. Rhyne, of the District of Columbia, declared that he was in agreement with Mr. Anthony and the Chair.

A vote was then taken, and the resolution was approved, 58 to 33.

Committee on Draft

The House voted to adopt the recommendation of the Committee on Draft, presented by Raymond F. Barrett, of Quincy, Massachusetts, referring to the Committee on Unauthorized Practice of the Law, a resolution dealing with unauthoritzed practice of law by accountants. The resolution had been offered by Allan Spivock, of San Francisco, on behalf of the Lawyers Club of San Francisco.

The Committee on Draft then offered the following, which was unanimously adopted:

Resolved, That the House of Delegates of the American Bar Association, both on its own behalf and on that of the Association, expresses its deep appreciation of the gracious hospitality extended to the members of the Association and its overseas guests from the General Council of the Bar of England and Wales, the Law Society of England, the Scottish Bar, the Law Council of Australia, and their ladies, by the gracious people of the District of Columbia, and the states of Virginia and Maryland on this the occasion of the 83d Annual Meeting of the Association, in this beautiful city of monuments and our Nation's Capital; further

Resolved, That the House extends its particular thanks to the Bar Association of the District of Columbia, the Federal Bar Association, Women's Bar Association of the District of Columbia, the Virginia State Bar, Virginia State Bar Association, Maryland Bar Association, Baltimore City Bar Association, and especially to the host committee of the Bar Association of the District of Columbia, who with their ladies have contributed to the free and wholehearted reception which has made this Annual Meeting a truly memorable occasion; and further.

Resolved, That the House expresses its very special gratitude to President and Mrs. Eisenhower for their heartwarming reception to the members of the American Bar Association and their guests; and further

Resolved, That the House expresses its deep appreciation to Her Britannic Majesty's Ambassador and Lady Caccia for so graciously receiving the members and guests of the American Bar Association; and further

Resolved, that the House expresses its appreciation to the Ambassador from Australia and Mrs. Beale, for their most gracious entertainment for the members and guests of the Association, and further

Resolved, That copies be sent to all parties who added so much to the success of the meeting.

The House then adjourned *sine die* at 10:05 A.M.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, John M. Skilling, Jr., Chairman; John M. Bixler, Vice Chairman.

Supreme Court Gift-Income Cases
By George W. Beatty, Washington, D. C.

If a father gives $500 to his son, the payment is presumably a nontaxable gift. If an employer gives a $500 bonus to an employee, the payment is almost certainly taxable income. Between these two poles there is inordinate confusion regarding the tax classification of voluntary payments, and three recent Supreme Court decisions do little or nothing to clarify the situation. See *Commissioner* v. *Duberstein* and *Stanton* v. *United States*, 363 U. S. 278; *United States* v. *Kaiser*, 363 U. S. 299. In large measure the Court's failure to clarify the situation stems from its deliberate, but debatable, decision to restrict the scope of appellate review in *all* cases of this type.

Each of the cases before the Court involved a recurring aspect of the general gift-income problem. In *Duberstein* the taxpayer was asked if he would furnish the names of potential customers to a company with which he had done business in the past. He suggested various names without any expectation of being paid for his services. The information proved valuable and the president of the company, duly grateful, presented the taxpayer with a Cadillac. Thus, the case squarely raised "the question whether a voluntary payment prompted by gratitude for business services was taxable".[1] The Tax Court held that the value of the car constituted taxable income. Relying on uncontradicted testimony regarding the payor's avowed intention to give Duberstein "a present", the Court of Appeals reversed. In an opinion by Justice Brennan which had the approval of four other justices, the Supreme Court reinstated the Tax Court's decision on the ground that it was not "clearly erroneous". Three justices concurred in the result on other grounds, and Justice Douglas dissented, believing the car to be a gift.

In *Stanton*, a companion case which was decided simultaneously, the taxpayer had received a "gratuity" of $20,000 when he resigned as president of a company which managed the real estate holdings of Trinity Church in New York. There was testimony that the directors of the company "liked" Stanton "personally", thought that he "was entitled to that evidence of good will", and intended the payment as a "gift". The resolution awarding the gratuity stated that it was being paid "in appreciation of the services rendered by Mr. Stanton" with the proviso that Stanton would release the company "from all rights and claims to pension and retirement benefits". However, it was admitted that Stanton actually had no such claims. The District Court concluded that the payment was a gift without setting forth any of the reasons for its conclusion. A divided Court of Appeals reversed and held that on the facts the payment constituted taxable income. Four members of the Supreme Court felt that the unelaborated conclusion of the trial court did not fulfill that court's "fact-finding" function, and picking up a fifth vote from Justice Whittaker, they remanded the case to the District Court for further proceedings. (On remand, the District Court again concluded that the payment was a gift. *Stanton* v. *United States*, E.D. N. Y., decided August 31, 1960, 1960-2 U.S.T.C. §9703.) Two of the four dissenting justices concluded that the payment was taxable. One concluded that it was a gift, and the remaining dissenter concluded that the gift determination made by the trial court was not clearly erroneous.

Finally, the *Kaiser* case involved the tax treatment of subsistence benefits which had been paid by a union to a striking non-union worker during the Kohler strike. The amount paid was based solely on the worker's needs, but to receive anything at all, he had to remain on strike. The constitution of the International Union imposed a general duty on the union to render assistance to striking workers during a strike authorized by the International. The case was tried before a jury which concluded that the benefits were nontaxable. The district judge entered judgment n.o.v. but was reversed by the Court of Appeals. In affirming the Court of Appeals' decision, the Supreme Court held that the question was one for the jury and that its conclusions were reasonable on the evidence. Three justices dissented on the ground that the undisputed facts compelled the conclusion as a matter of law that the strike benefits were not gifts and, therefore, constituted taxable income.

In deciding the *Duberstein* and *Stanton* cases, the only guideposts which the Court laid down were general statements culled from earlier cases.[2] After reiterating these general principles, the majority opinion states:

> Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case.[3]

The "most critical consideration" is still the transferor's "intention", and hence the fact-finder must use his "informed experience with human affairs"

1. Commissioner's Petition for Cert., *Commissioner* v. *Duberstein*, No. 376, October Term, 1959, page 8.

2. Thus, the fact that a payment is made voluntarily without any consideration or compensation for it does not necessarily mean that it is a gift for tax purposes. *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 730 (1929). If the payment proceeds primarily from "the constraining force of any moral or legal duty", or from "the incentive of anticipated benefit" of an economic nature, it is taxable income. *Bogardus* v. *Commissioner*, 302 U.S. 34, 41 (1937). If it is made in return for services rendered, it is taxable income, irrespective of the fact that the payor "derives no economic benefit from it". *Robertson* v. *U. S.*, 343 U.S. 711, 714 (1952). However, the payment is a gift if it proceeds from a "detached and disinterested generosity", *Commissioner* v. *LoBue*, 351 U.S. 243, 246 (1956), or "out of affection, respect, admiration, charity or like impulses", *Robertson* v. *U. S.*, *supra*.

3. 4 L.ed. 2d 1218, 1227.

to determine "the dominant reason" explaining the payer's "action in making the transfer".[4]

Since decisions must be based on the "totality of the facts of each case", the majority opinion concludes:

> One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker* v. *Texas & P. R. Co., supra* [359 U. S. at 228]. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous". Fed. Rules Civ. Proc., 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.* 333 U. S. at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609, 610. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I.R.C., §7482(a).[5]

Similarly, in *Kaiser* the Court stated:

> We think, also, that the proofs were adequate to support the conclusion of the jury. Our opinion in *Duberstein* stresses the basically factual nature of the inquiry as to this issue. The factual inferences to be drawn from the basic facts were here for the jury...
>
> We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. The question is one of the allocation of power to decide the question; and once we say that such conclusions could with reason be reached on the evidence, and that the District Court's instructions are not overthrown, our reviewing authority is exhausted, and we must recognize that the jury was empowered to render the verdict which it did.[6]

By restricting the scope of appellate review in this manner, the Court has, in effect, overruled *Bogardus* v. *Commissioner*, 302 U. S. 34 (1937), insofar as that case held that resolution of the gift-income question is a "conclusion of law or at least a determination of a mixed question of law and fact" subject to unimpaired judicial review. The approach taken by the present Court is certainly not novel, because there are numerous decisions holding that inferences and ultimate conclusions drawn from undisputed facts are themselves conclusions of "fact" which must be sustained on review unless clearly erroneous.[7] At the same time, however, it is obvious that the Supreme Court was not required to take the approach it adopted in *Duberstein* and *Kaiser*. Analytically, it can be argued with considerable force that in cases where there is no dispute about the primary evidentiary facts, the result reached on consideration of those facts constitutes a conclusion of "law" with respect to the particular facts of that case. Labeled in this way, the conclusion becomes freely reviewable and numerous courts have so held.[8]

Accepting the premise that both of these approaches are legally defensible, the question of choosing between them becomes largely a matter of sound judicial discretion. Arguably, the Supreme Court made the wrong choice in deciding the *Duberstein*, *Stanton* and *Kaiser* cases.

It is submitted that by refusing to decide the cases on their merits, the Court wasted an ideal opportunity to make a significant contribution to the law in an area where authoritative guideposts are sorely needed. Had the Court chosen to exercise its discretion differently and squarely faced the difficult job of determining the tax status of the payments involved in these cases, much of the existing confusion in this area would have been dispelled by virtue of the very fact that there were three authoritative decisions running one way or the other. Even if the Court had severely limited its analysis of the gift-income problem to the particular situations before it, a reasoned explanation of the basis for the Court's decision in these cases almost certainly would have provided a firm foundation for the resolution of related cases through the familiar process of analogy and distinction.[9] Not all of the problems in this field would have disappeared; indeed, many of them would not even have been mentioned in an opinion of the type described. Nevertheless, an authoritative and positive step would have been taken towards resolution of the ultimate problem, with the result that at least some of the existing uncertainty and confusion in this field would have been eliminated.

Instead of taking this approach the Court chose to dispose of the cases in a way which furnishes no real guidance to the lower courts, the tax bar or the Treasury. All that the Court decided is that the initial results reached in these cases were not clearly wrong. Hence, it is still possible for others to argue or decide that the opposite result is equally justified on the same facts because it is not "clearly erroneous" either.

The possibility that similarly situated taxpayers will be treated differently is an inevitable result of the Court's decision to treat determinations in this field as conclusions of fact which cannot be upset unless "clearly erroneous", even though those determinations are based on evidentiary facts which are undisputed. Until and unless specific guideposts are laid down, conflicting results are almost inevitable in view of the broad discretion which the Court has given to fact-finders and the latitude which is implicit in the "clearly erroneous" rule. The Court is being unrealistic when it suggests that "diversity of result will tend to be lessened" by the "natural tendency of professional triers of fact to follow one another's determinations".[10] The experience of the last twenty-five years makes it clear that co-ordinate lower courts have hopelessly divergent views on the problems in this area, and without authoritative guidance from some

4. *Ibid.* at 1225, 1228.
5. *Ibid.* at 1228.
6. 4 L. ed 2d 1233, 1236-7.
7. See, *e.g.*, *Commissioner* v. *Spermacet Whaling & Shipping Co., S/A*, ... F.2d ... (6th Cir. 1960); *Weyl-Zuckerman & Co.* v. *Commissioner*, 232 F.2d 214 (9th Cir. 1956). Cf. *Dobson* v. *Commissioner*, 320 U.S. 489 (1943); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944).
8. See, *e.g.*, *Gudgel* v. *Commissioner*, 273 F.2d 206 (6th Cir. 1959); *Bounds* v. *U. S.*, 262 F.2d 876 (4th Cir. 1958); *Wilson* v. *U. S.*, 257 F.2d 534 (2d Cir. 1958). *Cf.* Jaffe, *Question of Law*, 69 HARV. L. REV. 239 (1955).
9. Compare the effect of *Commissioner* v. *LoBue*, 351 U.S. 243, 246-7 (1956) and *Commissioner* v. *Jacobson*, 336 U.S. 28 (1949).
10. 4 L. ed. 2d 1218, 1227-8.

other source, these divergent views are almost sure to continue.[11]

It is no answer to say, as the Court does, that "if there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative",[12] as it has done in the case of prizes and awards. This argument shifts the burden of clarification to Congress in an area where development of the law has traditionally been a judicial function. The primary responsibility for resolving highly technical tax questions necessarily rests with Congress and the Treasury, but where the problem is a general and fundamental one—as it is in the gift-income field—Congress cannot be expected to settle every conceivable aspect of the problem by writing a succession of statutes which will be essentially self-executing. Where Congress has deliberately left the statute in simple form with the idea that its scope can best be determined through the process of judicial decision, the courts obviously have an obligation to implement the statute in an orderly way if at all possible. When the Supreme Court bolsters its refusal to decide appropriate cases on the merits with the argument that any resulting confusion and uncertainty can always be eliminated by Congress, it is at least questionable whether this traditional judicial responsibility is being fulfilled.

The foregoing criticisms can be applied to all three of the decisions rendered by the Court, but the *Kaiser* case throws them into sharpest focus. *Kaiser* involved an issue of national importance. Indeed, the Court granted the Government's petition for certiorari even though a conflict had not yet developed. From a practical standpoint, it was obviously desirable to settle the tax treatment of strike benefits which a union pays to workers on the basis of need, provided they are willing to remain on strike. From a legal standpoint, the case was significant because it presented a sharp test of the meaning of the "gift" exclusion.

By deciding the case on the ground that the verdict rendered by this particular jury was not unreasonable, the Court obviously failed to settle the practical problem. As it now is, the rule of law which the Court could have announced will not be established until enough cases have been litigated with sufficiently uniform results to convince either the Treasury or Congress that it is time to call a halt and settle the matter definitively. From a legal standpoint, there were good reasons for facing the issue squarely because the case arose on undisputed facts and presented a fundamental tax problem where a decision on the merits would have been a valuable and helpful precedent by reason of the fact that it would have afforded a concrete example of the application of otherwise elusive generalizations. *Kaiser* in particular, is a case which the Court could and should have decided on the merits.

11. In its brief on the merits, *Commissioner v. Duberstein*, No. 376, October Term, 1959, pages 11-12, note 6, the Government discussed some twenty representative cases reflecting the divergent views of various Circuit Courts. Since the elusive (and often conflicting) standards applied by most lower appellate courts remain essentially unchanged by the present decisions (see 4 L. ed. 2d 1218, 1225-7), there is little reason to hope that the initial determinations made by trial courts and juries will be any more consistent than they now are.

12. 4 L. ed. 2d 1218, 1227.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Vice Chairman,
Junior Bar Conference, Editor

Officers and Directors Meeting

On October 8 and 9, the officers and directors of the Junior Bar Conference met at the American Bar Center in Chicago to review plans and assignments for the current year. In attendance were Chairman William Reece Smith, Jr., of Tampa, Florida; Vice Chairman Kenneth J. Burns, Jr., of Chicago; Secretary James R. Stoner, of Washington, D. C.; and the four directors for this year, Richard H. Allen, of Memphis; Robert W. Merrill, of San Francisco; Wallace D. Riley, of Detroit, and Walter F. Sheble, of Washington, D. C. S. David Peshkin, of Des Moines, Iowa, was also present, as chairman of the Committee on Budget and Scope and Correlation, along with a number of committee chairmen.

Considerable attention was given to the new Committee on Court Improvement. The co-chairmen, John C. Feirich, of Carbondale, Illinois, and Philip B. Hill, of Charleston, West Virginia, were present to discuss the functions of their committee. It will operate in three basic areas: (1) improving the appearance of courthouses and courtrooms, including efforts to bring to light old legal documents of significance to the profession; (2) implementation of a portion of the Consensus of the National Conference on Judicial Selection and Court Administration; and (3) co-operation with the Section of Judicial Administration. The establishment of this committee marks the first time the Junior Bar Conference has directly undertaken new projects in the field of court administration since the advent of the traffic court program some years ago.

Another subject receiving considerable attention was the proposal for increased representation of the Junior Bar Conference and its some 27,000 members in the governing bodies of the American Bar Association. A proposal to this end was prepared by Director Sheble and approved at the meeting. It will be presented by Chairman Smith to the appropriate Association officials. Areas for improvement in the Conference by-laws and in the Conference Assembly rules of procedure were decided upon, and specific proposals will be presented at the 1961 Midyear Meeting. Peter H. Beer, of New Orleans, Chairman of the By-laws Committee, and George B. Raup, of Springfield, Ohio, Speaker of the Conference Assembly, have the responsibility for preparing these proposals.

Director Allen and James A. Stemmler, of St. Louis, Vice Chairman of the Conference's Annual Meeting Committee, reviewed their plans for the Annual Meeting in St. Louis, in August, 1961. Mr. Allen is in over-all charge of the arrangements, and he will be assisted by the Annual Meeting Committee comprised of Conference members in St. Louis.

Culminating Conference efforts on lawyer placement, the officers and directors approved the submission to the Board of Governors of a proposal to establish a permanent placement service to be operated by the Association. Working with the American Law Student Association, the Conference has recommended that this service be established as soon as possible in order to meet the great need made apparent by the placement service so successfully carried on at the 1960 Annual Meeting in Washington.

The programs at the Houston Regional Meeting in November and at the Indianapolis Regional Meeting in May, 1961, were also reviewed. The Conference will have joint circuit or district meetings at each of these meetings, to which state and local chairmen of junior bar organizations in the states will be invited. John G. Weinmann, of New Orleans, is in charge of the Conference's program at the Houston meeting. He will be assisted by Finis E. Cowan, of Houston. Robert H. McKinney, of Indianapolis, will supervise the program at the Indianapolis meeting, assisted by Carl Overman, also of Indianapolis.

John J. Thompson, of Memphis, reviewed plans for the Award of Achievement Committee, of which he is chairman. Increased interest in this program has been indicated at recent annual meetings by the growing number of state and local junior bar organizations competing for J.B.C. Awards of Achievement. All state and affiliated local junior bar organizations will receive information about the 1961 program later in the year.

Under the chairmanship of J. Rex Farrior, of Tampa, the Committee on Co-operation with Other Association Sections will continue its efforts to encourage the appointment of interested members to subcommittees of other Sections. To this end, the Conference will continue its program of publicizing positions which are available to members and of encouraging participation in the work of the other Sections by younger lawyers generally.

Also reviewed by the officers and directors were plans for the affiliation of a number of state and local organizations, to add to the over one hundred such organizations which have already become a part of the Conference Assembly. Co-chairmen of this committee are William R. Cogar, of Richmond, and Charles R. Rutherford, of Detroit. The work of this committee will include a revision of the *Affiliation Handbook*, which was published by the Conference to inform state and local junior bar organizations of the benefits of affiliation.

Further participation by the Conference in the Association's support for H. R. 10, a measure which has been pending for many years before the Congress to give self-employed persons the tax treatment similar to that now available to employed persons. This will be one of the major projects of the Legislation Committee. Edwin S. Nail, of Washington, D. C., is the chairman. The Conference will continue to sup-

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Chicago Photographers

Conference officers and directors met in the Board of Governors Room at the American Bar Center in Chicago, October 8. Seated around the table starting at the left are John T. Keefe, Director of the Association's Coordination Service; John C. Feirich; James A. Stemmler; Philip B. Hill; Wallace D. Riley; Richard H. Allen; S. David Peshkin; James R. Stoner; William Reece Smith, Jr.; Kenneth J. Burns, Jr.; Robert W. Merrill; Walter F. Sheble; Joseph D. Stecher, Executive Director of the Association; James R. Sweeney; Merilyn J. Brendel, Headquarters Secretary; Charles O. Brizius; and Lowell R. Beck.

port a bill to provide compensation for court appointed counsel in federal criminal cases.

The Membership Committee, under Co-Chairmen Richards D. Barger, of Los Angeles, and Robert V. Light, of Little Rock, will continue the successful efforts to sponsor Association membership drives at bar admission ceremonies in the various states. The committee will prepare a brochure describing how these programs have been carried on thus far in order to encourage state and local junior bar organizations to undertake them in their states. The committee will work for 100 per cent Association membership among young lawyers belonging to state and local affiliated units.

Law Day, 1961, will receive particular Conference attention this year. The Law Day committee, under Thomas M. Collins, of Cedar Rapids, Iowa, and James R. Brennan, of Rapid City, South Dakota, Co-chairmen, assist state and local units in sponsorship of Law Day ceremonies in their respective areas. The Committee will furnish pertinent materials and model speeches to state and local organizations. The Conference will continue its program of co-operation with the United States Junior Chamber of Commerce to encourage Jaycee chapters throughout the country to participate in Law Day ceremonies.

The Medico-Legal Committee will, among other things, prepare a bibliography of pertinent publications on personal injury cases, to be distributed later to members. The co-chairmen of this committee are R. Harvey Chappell, Jr., of Richmond, and Arthur W. Leibold, Jr., of Philadelphia.

The Projects Committee, under co-chairmen Philip R. Dunn, of Hartford, Connecticut, and Gerald J. Kahn, of Milwaukee, will continue the program carried on for the past two years of supplying state and local units with practical and detailed information about junior bar projects. Three such project reports are planned.

Similarly, the Continuing Legal Education Committee will intensify its efforts to promote such programs by state and local affiliated units. Lewis H. Hill III, of Tampa, and George T. Roumell, Jr., of Detroit, are co-chairmen of this committee. Indicative of

the importance of this work so far as the Conference is concerned, Director Riley will also give attention to this subject. Initial plans propose at least ten such programs to be sponsored this year by junior bar organizations which have not been active in this field.

James R. Sweeney, of Chicago, explained his plans for the Unauthorized Practice of Law Committee, of which he is again chairman. This committee has sponsored programs on unauthorized practice in various law schools around the country during the past year, and hopes to expand them this year.

Edwin S. Rockefeller, of Washington, D. C., will serve again as Chairman of the Committee on the Status of the Young Lawyers in Government. Among other things, this committee will continue its operation of the Placement Information Service for lawyers interested in government employment and will follow up on its extensive questionnaire to government lawyers to get information on their attitudes toward government employment. This committee will work to increase Association membership among government lawyers.

Robert T. Thompson, of Atlanta, heads the new Committee on a Survey of the Services and Needs of J.B.C. Members. This committee will distribute a questionnaire to a selected group of young lawyers throughout the country as a pilot study. The results gained from this survey will be used in preparing a questionnaire to go ultimately to all Conference members in an effort to learn the needs of young lawyers and determine what services the Conference should provide.

J.B.C. publications are perhaps better manned this year than ever before. Harry Wright III, of Columbus, Ohio, is editor of the *Report to Locals*, which will shortly go to all state and local affiliated units with information about the events of the 1960 Annual Meeting and the programs of the award-winning junior bar organizations participating in the Award of Achievement program. Charles O. Brizius, of Chicago, will continue as editor of *The Young Lawyer*, assisted this year by three associate editors, Thomas P. Brown III, of Washington, D. C., Thomas P. Sullivan, of Chicago, and Lowell R. Beck, who until recently was the Conference's Administrative Assistant and who has recently been named to assist Donald E. Channell in the Association's Washington office. The *Directory* for the current year will be published shortly under the supervision of Secretary Stoner. This year it will contain not only the names and addresses of committee personnel, but also the By-laws, Conference Assembly rules of procedure and other information about the Conference. The *Journal* page "Our Younger Lawyers" will be prepared at the headquarters office under the supervision of Vice Chairman Burns. Several of the Conference committees will prepare new brochures this year on their particular activities. All in all, the Conference's publications will be more extensive and varied than ever before, and it is expected that they will better serve their purpose of maintaining close relationships between the Conference, its state and local affiliated organizations, and its 27,000 members.

A substantial program is planned for the Pre-Practice Orientation Committee under Chairman Paul W. Orth, of Hartford, Connecticut. This committee will begin a program to establish pre-law clubs in various colleges and universities, and it will continue in its efforts to promote the legal profession as a career among able high school and college students.

Stephen N. Maskaleris, of Newark, New Jersey, is the Chairman this year of the Clients Security Funds Committee, the primary purpose of which is to encourage the establishment of such funds by the various state and local bar associations. The committee is cooperating closely with the Association's Standing Committee and it will concentrate on a select number of junior bar organizations to enlist their help in the establishment of these funds by their respective bar associations.

The Military Service Committee will continue its program of encouraging Association membership by military lawyers, and will undertake to revise its report on state bar admission requirements as they pertain to lawyers leaving the military service. It is contemplated that this revised report will be published later.

Ewell E. Murphy, Jr., of Houston, Texas, is chairman of the Inter-American Bar Committee, whose purpose is to continue the traditional exchange of information between the younger lawyers section of that bar association and the Conference.

Chairman this year of the Committee on Liaison with the Canadian Junior Bar is John S. Rendleman, of Carbondale, Illinois. This committee's function is to further the long-standing program of co-operation with our Canadian friends.

Robert O. Hetlage, of St. Louis, is chairman of the World Peace Through Law Committee, which will continue the program developed last year.

Robert C. Wark, of Miami, Florida, is chairman of the State and Local Presidents' Reception, to be presented as a part of the J.B.C. Annual Meeting program. This reception has come to be one of the highlights of the meeting.

Conference Seeks New Administrative Assistant

Lowell R. Beck, who will take up his duties as Assistant Director of the Washington Office on December 1, has resigned as Administrative Assistant of the Conference, and that position is now open. Any Conference member interested in this position is asked to contact the Headquarters Office, American Bar Center, Chicago 37, Illinois.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

In the following article, the work of the National Legislative Conference, a body devoted to the improvement of the legislative product, is described. The author is Law Revision Counsel of the United States House of Representatives Committee on the Judiciary and is an internationally known authority on legislative matters.

The National Legislative Conference

By Charles J. Zinn

Law Revision Counsel, U. S. House of Representatives Committee on the Judiciary

During recent years considerable attention has very properly been given to the need for the co-ordination of the activities of different agencies of government particularly with the view of communicating to each other developments in projects of mutual interest. Obviously, costly duplications of effort and research can be avoided if each agency will make available to the others the benefit of its experience, especially if there is opportunity for discussion of mutual problems and practices. An agency may find that one of its projects has already been successfully completed by another agency and it need only adapt it for its own use. Furthermore, a better product by each is almost sure to result.

Shortly after the close of World War II it became apparent to legislative leaders and others in a number of the states that, even though each state has individual problems peculiar to it, the operation and administration of state legislatures throughout the nation by and large have much in common, but there was no organization or medium through which the experiences of the several legislatures could adequately be communicated to the others. Of principal interest was the need for modernizing the state legislatures, with special reference to the improvement of staffing, inasmuch as the Congress had then recently enacted the Legislative Reorganization Act of 1946 and public interest in the entire subject was at its height.

There was already in existence at that time the Council of State Governments which is a joint governmental agency established by the states and which serves governmental progress in the individual states and among the states working together. Affiliated with it were the Governors' Conference, the National Association of Attorneys General, and the National Conference of Commissioners on Uniform State Laws, all of which had been in existence for many years. It was natural that the officials and private individuals who had manifested an interest in the establishment of a medium to assist the states in legislative matters should turn to The Council of State Governments for advice and assistance.

Accordingly, The Council of State Governments arranged a preliminary conference at Chicago, in November, 1947, to explore the matter, and for the first time representatives of the legislative reference and other service agencies of twenty-three states and the Library of Congress met together on a national basis. The conference disclosed an appalling and almost complete lack of effective exchange of legislative information and materials among the states and it was decided, even before the formal organization of a National Conference, that The Council of State Governments should be the depository of state and territorial legislative research reports with the view of making information available, particularly with respect to contemplated and completed legislative research activities. As a result, the Council published the first Legislative Research Checklist in 1947 and has continued to publish issues periodically since that time. The checklists, which are available on a subscription basis from The Council of State Governments,[1] provide information regarding research projects in the states and indicate whether and how the reports and other documents listed may be procured by the public.

These were the beginnings of an extremely important but little-publicized organization—The National Legislative Conference.

Organization of the Conference

In October, 1948, the committee on permanent organization that had been appointed the previous year to look into the question of the establishment of a national association of legislative service agencies made its report, and the organization was created as the Legislative Service Conference. In 1954 the name was changed to National Association of Legislative Service Agencies and a year later the present name was adopted.

Membership in the Conference is extended *ex officio* to all state and territorial legislators who are officers of legislative service agencies and to the staff heads and administrative officers of those service agencies; it may also be extended to other persons whose duties include or have included service to the legislatures or to the Congress or to a legislative service agency as shall be designated by the Conference.

The management of the Conference is under the direction of an executive committee of fifteen members, including the president, the vice president, and the immediate past president, with The Council of State Governments serving as the secretariat. The number of the additional directors was increased from eight to twelve at the 1960 meeting. A unique feature is that when the president of the Conference is a legislator the vice president must be a representative of the field of legislative services, and vice versa. Similarly, six of the twelve additional members of

1. 1313 East Sixtieth Street, Chicago 37, Illinois.

the executive committee are legislators. This arrangement, preserving a nice balance between legislators and staff members, provides a broader scope for the activities and accomplishments of the Conference. The executive committee comprises a consultative and advisory committee for the direction of the activities of the Conference. In voting on proposals the states, territories and the Congress of the United States are entitled to but one vote each.

Regular meetings must be held annually at the time and place the executive committee designates, and special meetings may be called at the request of members from any ten-member jurisdictions. Representation from twenty-member jurisdictions constitute a quorum for the transaction of business at a regular meeting.

Activities

The fourteen annual meetings of the Conference usually take place in the latter part of the year and have been held in eleven cities of the United States—from Seattle, Washington, to Miami Beach, Florida.

Since the 1950 meeting, when the Legislative Reference Service of the Library of Congress acted as host, the Conference has met regularly as the guest of a host legislative service agency. In addition to representation from all fifty states of the Union the meetings have been attended by individuals from the District of Columbia, Guam, Puerto Rico, Samoa and the Virgin Islands. Foreign guests have attended from distant lands including Brazil, Chile, the Republic of China, West Germany, the Philippines, Jordan, Ethiopia and Korea.

Committees

One of the most important functions of the president of the Conference is to appoint all committees or subcommittees for special purposes, with the approval of the executive committee during the period between meetings. Since 1949 when a committee on legislative services was appointed to work with the secretariat in preparing extensive tabular information concerning legislative services, much of the work of the Conference has been carried on by committees. Over the years many additional committees have been created and their names indicate the breadth of interests of the Conference and provide a cross-section of the principal problems confronting most of the state legislatures today. Typical committees in recent years have been those on Legal Services for State Legislatures; on Federal-State Relations; on Income Taxation of Non-Residents; on Uniformity in Indexing, Classification and Numbering of Statutes; on Legislative Processes. At the 1959 Conference, this last-named committee submitted a preliminary report embracing such topics as legislative sessions and terms, compensation, committees, employees, and rules—with its recommendations for improvements in these areas. The Committee on Legal Services at the same meeting submitted an interim report on an evaluation of the adequacy and effectiveness of services in the fields of bill drafting, statutory revision, legislative counseling and substantive law revision. It can readily be seen that the topics considered are of the essence of efficient legislation.

The committees of the Conference are active throughout the year and their reports frequently reflect a tremendous amount of arduous and diligent attention by their members.

Workshops

The earlier meetings were devoted largely to panel discussions on such subjects as statutory revision, constitutional revision commissions and conventions, codification and drafting, legislative councils, uniform state laws and other topics of interest. As a natural outgrowth of these panel discussions the meetings beginning with the fifth conference in 1952 were organized in a number of workshops devoted to legislative research, bill drafting, legislative clerks and secretaries, reference and library services, statutory and code revision, legislative procedure, and fiscal analysis. During the course of these workshops there is serious critical evaluation of methods employed by the various state legislatures and the benefit of their experience is made available to the Conference. Usually there is a principal address by a qualified legislator or a staff member, and a detailed discussion follows; and in most instances a report is submitted to the Conference on the basis of the workshop session.

Addresses, Papers and Resolutions

Each year there are one or more general sessions of the Conference at which an address is delivered or a paper read by an outstanding governmental official, particularly of the executive or legislative branch of government. Appropriate resolutions on pertinent subjects are adopted at the closing session. Each year, with the exception of 1950, a useful summary of the Conference has been prepared and published and should be available to lawyers in law libraries. These summaries contain the text of statements and other extremely valuable information. At the 1958 Conference the President, Earl Sachse, executive secretary of the Wisconsin Legislative Council, evaluated the conference in the following words:

> This conference presents the only national forum which offers opportunities in three significant respects. First it permits the professional and technical staff people to meet with their colleagues in workshops concerned with their specific duties, to exchange ideas and more importantly to explore new avenues and new methods.
>
> Second, it provides the occasion for broadening our knowledge in that it is the only meeting where all of the state legislative services are present...
>
> And third, the presence of a large number of legislators from the several states makes it possible to have an exchange of ideas between the policy makers and the professional staff aides. Furthermore, the conference encourages legislators to discuss policy matters within their own workshops... Through this means many legislators have learned about services provided in other states, and it has led to the later adoption of such services in their own states.

Mr. Sachse's statement is borne out by the fact that the meetings of the Conference and the activities of the secretariat have resulted in the establishment or reorganization of legislative research committees and councils in various states. Similarly the number of states that provide orientation con-

ferences for legislators has increased, and additional legislative manuals have been published. Improvements have been made in bill-drafting, procedures, committee structures, and other essentials of good legislation.

The members of the American Bar who are so intimately concerned with the product of our state legislatures should have an abiding interest in this unusual organization that is doing so much to improve that product and to help the lawyers in understanding it. Legislative histories, which are such an important part of statutory construction are today more adequate and more authoritative because of the activities of the Conference and the secretariat. What is even more important to the lawyer is the fact that many valuable research papers are now available to him and, if through reading the Legislative Research checklists a lawyer only learns of the existence of, for example, law revision commission reports that may help him in construing a statute, his time will have been well spent.

A Report from the National Conference of Commissioners on Uniform State Laws

by George R. Richter, Jr. • *Los Angeles, California, President*

MEETING IN ITS sixty-ninth year at The Statler-Hilton in Washington, D. C., during the week preceding the American Bar Association's Annual Meeting, the National Conference of Commissioners on Uniform State Laws maintained its record of accomplishment. One hundred and thirty-five Commissioners appointed by the Governors and representing forty-seven states were in attendance. The list included fourteen deans of law schools, fourteen professors of law, sixteen federal and state judges, four attorneys general, twelve legislators and seventy-five practicing attorneys.

All-day meetings were held starting August 22 and continuing to August 27, at the conclusion of which the Conference promulgated three new uniform acts and an amendment to one existing uniform act. Each of these was approved by an appropriate Section of the American Bar Association, and the following week all were approved by the House of Delegates.

The uniform acts and amendments thereto approved were the following:

Uniform Testamentary Additions to Trusts Act: This act would solve the "Pour-Over Trust" problem and permit a will to provide that a part of the estate should go to an already existing trust without the necessity of repeating in the will all the terms of the trust, thus removing the doubt that exists as to whether the pour-over provisions are valid in view of the general requirement that a will be wholly in writing and signed in the presence of witnesses. The act permits subsequent amendment of the *inter vivos* trust unless the will provides otherwise.

Uniform Act on Paternity: This act was drafted at the suggestion of The Council of State Governments and the National Probation and Parole Association to establish a simple and effective civil action to replace the antiquated bastardy proceeding with its preliminary examination and other quasi-criminal features, which are still used in many states.

Uniform Securities Ownership by Minors Act: This act is one of a series of recent acts drafted by the Conference to facilitate business transactions. It exempts banks, brokers and transfer agents who handle securities of a minor but do not deal with the minor directly, from liability upon disaffirmance unless they had received notice of, or had actual knowledge of, the minority of the holder of the security.

Amendment to Uniform Acknowledgment Act: The amendment permits the taking of acknowledgments of dependents of members of the Armed Forces and of persons serving with but not actually members of the Armed Forces, before a commissioned officer in the same manner previously permitted by the Uniform Act to members of the Armed Forces.

In addition, the Conference approved a new Model Act and an amended Model Act. The new Model Act is the Model Act Providing Remedies for the Unauthorized Practice of Law. It provides for the maintenance of an injunction action by the Attorney General upon his own information or upon complaint of any person, judge or organized bar association to enjoin the unauthorized practice of the law.

The Model Act To Provide for an Administrator for the State Courts, approved in 1948, was amended to place a court administrator on an equal footing with comparable major administrative agencies within the state, and to clarify that traffic courts came within its scope.

Since its formation in 1878, the Constitution of the American Bar Association has included as one of its objectives the promotion of "uniformity of legislation throughout the nation". Both the By-Laws of the American Bar Association and the Constitution and By-Laws of the National Conference require notification of and consultation with the other organization in the field of state legislation or uniform laws. Each year, the National Conference advises each Section of the American Bar Association of its current projects and asks for the aid and assistance of the appropriate committee or council of the Section with respect to the uniform and model acts which are in the process of drafting. Indeed, the Conference seeks the views of all interested groups in the field in which it is drafting or contemplating the drafting of a uniform or model act. Particularly, it welcomes the views of all members of the American Bar Association who

have an interest in or knowledge of the field.

The Conference has a heavy program of work scheduled for the future. Since all uniform and model acts are considered by the Conference at not less than two annual meetings before promulgation, there should be ample opportunity for all interested sections, committees and members of the American Bar Association to communicate their views.

The future work of the Conference falls within three basic categories:

(1) Those uniform or model acts, or revisions thereof, which have been considered at previous annual meetings of the Conference and will be eligible for final approval at the next annual meeting of the Conference at St. Louis in August, 1961;

(2) Those which are in actual process of drafting but which have not yet been considered by the Conference at an annual meeting and therefore should not be eligible for final approval until 1962; and

(3) Proposed uniform or model acts in connection with which the Conference has appointed special committees to investigate and report upon the advisability of drafting and the proposed scope of such acts.

The uniform or model acts, drafts of which have been considered by the Conference at one or more prior annual meetings and which will be eligible for final approval in 1961, are as follows:

Revised Uniform Principal and Income Act, Professor George G. Bogert, Sawyer, Michigan, Chairman

Model Retail Installment Sales Act, Judge Sterry R. Waterman, St. Johnsbury, Vermont, Chairman

Uniform Non-Residents Income Tax Deductions Act, Floyd R. Gibson, 11521 Winner Road, Independence, Missouri, Chairman

Uniform Death Tax Credit Act, Judge Jo. V. Morgan, District of Columbia Tax Court, Washington, D. C., Chairman

Uniform State Code of Military Justice, Lewie G. Merritt, State House, Columbia, South Carolina, Chairman

Model Real Property Lien Priority Act, Frank F. Jestrab, Hedderich Building, Williston, North Dakota, Chairman

Uniform Anti-Solicitation Act, Albert E. Jenner, Jr., 135 South La Salle Street, Chicago, Illinois, Chairman

Revised Uniform Federal Tax Lien Registration Act, Professor James W. Day, University of Florida Law School, Gainesville, Florida, Chairman

Revised Model State Administrative Procedure Act, Dean E. Blythe Stason, 1155 East 60th Street, Chicago, Illinois, Chairman

Uniform Nuclear Facilities Liability Act, Professor William J. Pierce, University of Michigan Law School, Ann Arbor, Michigan, Chairman

Uniform Extra-Territorial Process Act, Leonard C. Hardwick, 12 South Main Street, Rochester, New Hampshire, Chairman

The Conference especially solicits the views of the Sections, committees and members of the American Bar Association on any of these uniform or model acts and revisions thereof which will be eligible for final approval in 1961. Copies of the last available drafts of these acts may be obtained by writing Mrs. Frances D. Jones, Executive Secretary, National Conference of Commissioners on Uniform State Laws, at the American Bar Center, Chicago 37, Illinois. Comments and suggestions with respect to these drafts should be addressed to the respective chairmen of the drafting committees at their addresses as given above.

The proposed uniform or model acts, first drafts of which may be considered at the annual meeting of the Conference at St. Louis in 1961 but which will not be eligible for final approval until 1962, are the following:

Uniform Recognition of Foreign Judgments Act, Lawrence C. Jones, Rutland, Vermont, Chairman

Uniform Act on Officers Crossing State Lines, Dean Robert J. Farley, School of Law, University, Mississippi, Chairman

Uniform Weather Control Act, Talbot Rain, Republic National Bank Building, Dallas 1, Texas, Chairman

Uniform State Unfair Competition Act, G. M. Fuller, First National Bank Building, Oklahoma City, Oklahoma, Chairman

Members of the Association who are interested in the subject matters which will be covered by these acts to be considered for the first time should get in touch with the respective chairmen of the drafting committees.

Special Committees of the Conference have been appointed to investigate and report back to the Executive Committee as to the advisability of drafting uniform or model acts in several fields. The designations of these committees and their respective chairmen are as follows:

Uniform Act Defining Marriage and *Uniform Separation Agreements Act*, Smith Dunnack, State House, Augusta, Maine, Chairman

Uniform Act on Civil Rights of Convicted Persons, William Nash, 314 West Markham, Little Rock, Arkansas, Chairman

Uniform Regulation of Carriers Operating in Interstate Commerce Act, Professor Ben F. Small, 102 West Michigan Street, Indianapolis, Indiana, Chairman

Uniform Union Welfare and Pension Plans Act, Dean Russell N. Sullivan, University of Illinois Law School, Urbana, Illinois, Chairman

Uniform Act on Civil Rights of Persons of Questionable Competency, Professor Robert L. Howard, University of Missouri Law School, Columbia, Missouri, Chairman

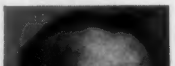
Uniform Insurance Code, Frank E. Dully, Travelers Insurance Company, Hartford, Connecticut, Chairman

Model Acts To Protect Land Titles Against Obsolete and Formal Defects, George H. Bowen, P. O. Box 1348, Tulsa, Oklahoma, Chairman

It would be of help to these committees to receive the views of all interested members, Sections and committees of the American Bar Association on the advisability of drafting acts in these fields and the proposed scope of such acts. Everyone interested is invited to communicate his views to the proper committee chairman.

Although the Conference has a heavy schedule before it, its object is to draft uniform laws "on all subjects where uniformity is desirable and practicable" and to draft model acts on "subjects in which uniformity will make more effective the exercise of state powers and promote interstate co-operation". Here again, the Conference extends an invitation to the Sections, committees and members of the American Bar Association to suggest areas and subjects for the drafting of uniform and model acts.

BAR ACTIVITIES



Ernest C. Wunsch

Paul Gach

The State Bar of Michigan in late September celebrated its silver anniversary as an integrated Bar.

A crowded ballroom in Grand Rapids' Pantlind Hotel heard Roscoe O. Bonisteel, of Ann Arbor, speak of the early beginnings; George E. Brand, of Detroit, discuss twenty-five years of great professional progress; Burney C. Veum, of Sioux Ste. Marie, take a look into the future; and Chief Justice John R. Dethmers describe a close relationship between Bench and Bar.

"Twenty-five years of constant growth and service", said Ernest C. Wunsch, of Detroit, newly elected President, "have enabled us to forge ahead as a professional organization. In my opinion, it was worth the effort, and especially for the 9000 active members on our rolls today."

A beautiful four-tiered speakers' table was arranged for special guests, the first Board of Commissioners, past Presidents, current commissioners, and 50-year award recipients.

Elected along with Mr. Wunsch for one-year terms were Ronald M. Ryan, of Battle Creek, First Vice President; Maxwell F. Badgley, of Jackson, Second Vice President; William J. McBrearty, Detroit, Secretary; Howard W. Fant, Grand Haven, Treasurer.

To Dean E. Blythe Stason was presented a special citation for his service as a member of the Board of Commissioners, his deanship of the University of Michigan Law School, and for being a magnificent citizen, inside and outside of the profession.

Another citation was given to G. Douglas Clapperton, of Lansing, for his more than 32 years of service on the board of law examiners.

There was a profusion of good speakers at the various section programs, and they included, in addition to the Chief Justice and Associate Justice George Edwards, the following from out of the state: Eli Rock, of Philadelphia; Dr. Arthur Larson of Duke University; Albert E. Jenner, Joseph H. Hinshaw and Philip H. Corboy, of Chicago; Norris Darrell, of New York City; Richard D. Hobbet, of Milwaukee; Michael Waris, Jr., of Washington, D. C.; A. T. Burch, of Chicago; Robert A. Bicks, of Washington, D. C.; and Raymond Burr, of Los Angeles.

Lawyers Wives of Michigan held its third annual meeting and elected as president Mrs. Lester P. Dodd, of Detroit.

John P. Ilsley

The 1960 Annual Meeting of the Wyoming State Bar convened in Casper on September 8, and concluded its session on September 10.

John P. Ilsley, of Gillette, succeeded Charles M. Crowell, of Casper, as President for the 1960-61 year. George P. Sawyer, of Torrington, and George J. Millett, of Laramie, were chosen as President-Elect and Vice President, respectively. John T. Dixon, of Powell, was re-elected Secretary-Treasurer.

The opening session was devoted to a discussion of the Model Corporation Act and the proposed constitutional amendment providing for the acceptance of the Act. Following the discussion of the Model Corporation Act, Harold S. Bloomenthal of Laramie, presented a paper on "Intra-State Exemption of the Securities Act" followed by a panel discussion on title examination and proposed curative procedure.

A luncheon for members and wives was held at the V. F. W. Club where E. A. "Ted" Hunt, of Sydney, Australia, spoke on "The Australian Lawyer", outlining the various problems with which the Australian lawyer is confronted as opposed to his American counterpart.

A session was devoted to the Uniform Securities Act and reports from the various committees. Thurman Arnold, of Washington, D. C., Leo S. Karlin, of Chicago, President of NACCA, and John C. Shepherd, of St.

Louis, Chairman, Medico-Legal Committee of the Junior Bar Conference, presented a panel on the "New Approach to the Use of Demonstrative Evidence in the Trial of Personal Injury Actions".

The Junior Bar Association for the State of Wyoming met during the meeting; and elected George Hopper, President, Thomas Lubnau, Vice President and James T. Daley, Secretary-Treasurer.

The speaker at the annual banquet was Thurman Arnold, of Washington, D. C., a native of the State of Wyoming.

Bar associations located in the East and Middle West may be interested in the lectures on Magna Charta, English drama and the Passion Play which are described in the letter on page 1169.

The Rhode Island Bar Association held its Annual Meeting and Dinner on Monday, October 10, in East Providence, Rhode Island. President Ellis L. Yatman presided.

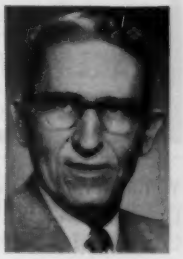
Thirty-one committee reports were received. In many of the reports ran the undercurrent of projects and services that were ready to be implemented as soon as funds were available. The

Sayles Gorham

Finance Committee studied the Association's financial situation for the past ten years and recommended a dues' increase to handle the expanded program of activities and services now in effect and those that are planned. The recommendations of the Finance Committee were adopted without change.

At the Annual Dinner, the principal speaker was Chief Justice Walter V. Schaefer of the Illinois Supreme Court, who spoke on the career of Charles Doe, a former distinguished Chief Justice of New Hampshire.

Sayles Gorham, serving as President-Elect during the past year, received the gavel from retiring President Yatman. Other officers elected to serve for the coming year are as follows: James H. Higgins, Jr., President-elect; Francis J. O'Brien, Vice President; Julius C. Michaelson, Secretary; Francis X. LaFrance, Treasurer; James C. Bulman, Chairman of the Executive Committee. Elected to the Executive Committee, in addition to the officers, were: Earle B. Arnold, Melvin A. Chernick, Americo Campanella and Westcote H. Chesebrough.



D. B. Lang

The mid-year meeting of the Bar Association of the State of Kansas was held in Wichita on October 28. This is an annual meeting commenced several years ago to afford committees an opportunity to meet and discuss face-to-face problems. One of the highlights is the annual presentation of the News Media-Bar Award. This is presented to a journalist, author or radio commentator of Kansas; a certificate goes to the newspaper or station and the winner gets $250. Delegates to the American Bar Association report on the annual meeting of that Association.

D. B. Lang, of Scott City, was installed in the office of President of the Association at the conclusion of the annual meeting which was held May 5, 6 and 7, in Kansas City, Kansas. He was elected President-Elect at the annual meeting in 1959 and became the head of the state association upon the death of President William M. Beall, of Clay Center, September 9, 1959.

Other officers elected at the 1960 annual meeting were Alexander M. Fromme, of Hoxie, President-Elect, and Harry O. Janicke, of Winfield, Vice President. George B. Powers, of Wichita, was re-elected Secretary-Treasurer. Executive Council members elected were James B. McKay, Jr., of El Dorado, 4th District; F. C. Bannon, Leavenworth, 1st District; L. A. McNalley, Minneapolis, 5th District; Wesley E. Brown, Hutchinson, 7th District; Maurice Wildgen, Larned, 9th District; Executive Council members now serving are Clayton M. Davis, Topeka, 2nd District; Joe F. Balch, Chanute, 3d District; William M. Ferguson,

Wellington, 6th District, and Robert J. Dole, Russell, 9th District. Franklin Corrick, of Topeka, is editor of the *Kansas Bar Journal*, and John W. Shuart, of Topeka, is Executive Secretary.

Shortly following the annual meeting, the Association's offices were moved from 505 to 301 Columbian Building in Topeka. This provided double the space previously available in the headquarters. More efficient executive, secretarial, clerical, mailing and storage space is available and a committee conference room is planned.

The annual banquet speaker this year was Judge Kirksey Nix, Court of Criminal Appeals, Oklahoma City. Those receiving the fifty-year awards, attesting to their long and valued contribution to the legal profession were: L. R. Gates, Guy E. Stanley and H. G. Wierenga, of Kansas City; James Cassler, McPherson; John Riling, Lawrence; Irwin Snattinger, Topeka; Lester Luther, Cimarron; Walter G. Thiele, Topeka; Z. Wetmore, Wichita; D. M. Ward, Peabody Lucian Rutherford, Leavenworth; Tinkham Veale, Topeka; A. K. Stavely, Lyndon; and Jesse A. Hall, Leavenworth.

Related associations of city attorneys, district judges, county attorneys, probate judges and shorthand reporters met in conjunction with the bar meeting. Elected trustees of the Kansas Bar Foundation, a charitable foundation, were: L. J. Bond, El Dorado; Robert Braden, Wichita; Fred Conner, Great Bend; J. Willard Haynes, Kansas City; Horace H. Rich, Coldwater, and James E. Taylor, Sharon Springs. President Lang, President-Elect Fromme and John W. Shuart, Executive Secretary, serve as *ex officio* members of the board of trustees.

John Patrick Carey

John Patrick Carey, of Bath, was elected President of the Maine State Bar Association at its annual meeting, August 23 to 25, at Rockland, Maine.

Among the speakers at the sessions were Benjamin L. Berman, of Androscoggin, Maine; Professor Thomas F. Lambert, Jr., of Watertown, Massachusetts; and Professor Delmar Karlen, of New York University School of Law.

Two panel discussions were held—the first on "Feasibility of District Court System for Maine", with Professor Lewis Mayers, Professor Emeritus of Law, City College of New York, as Chairman, and the second on "Land Marks and New Directions in Torts" with Professor Lambert as Chairman.

Robert J. McCandlish, Jr.

—Fabian Bachrach

The Seventieth Annual Meeting of The Virginia State Bar Association, held at The Greenbrier, White Sulphur Springs, West Virginia, August 4-7, was attended by approximately 700 Virginia lawyers, judges and guests. The first business session was called to order by Virginius R. Shackelford, Jr., of Orange, Chairman of the Executive Committee. One hundred and five new members were elected. The highlight of this session was the President's address given by William P. Dickson, Jr., of Norfolk.

The Association adopted the report of the Committee on Uniform State Laws including a recommendation that the Association "in an appropriate manner, request all the state organizations representing commercial interests —the Virginia Bankers Association, the Virginia State Chamber of Commerce, the Virginia Manufacturers Association, the Virginia Railway Association, and similar groups—to appoint committees to study the Uniform Commercial Code as it affects their interests with a view to its early adoption". A plea for the adoption of the Commercial Code was voiced by Professor Wilfred J. Ritz of the Washington and Lee Law School, Chairman.

"How the Supreme Court of Appeals Functions" was the subject of an address by Mr. Justice Lawrence W. I'Anson, of Portsmouth. Alfred P. Murrah, of Oklahoma City, Oklahoma, Chief Judge of the United States Court of Appeals for the Tenth Circuit, also spoke at this session.

The meeting took on a political flavor at an evening session, but to insure impartiality the Program Committee presented a representative of each of the two major political parties. Senator Thruston B. Morton, of Kentucky, presented his colleague, Senator Sam J. Ervin, Jr., of North Carolina, who spoke first on the subject "The Issues as We See Them". At the close of his address Senator Ervin introduced Senator Morton who spoke on the same subject.

W. Paul McWhorter, of Clarksburg, West Virginia, President of the West Virginia Bar Association, brought greetings from his Association to the members of the Virginia Association. This was followed by an address on "Lawyers and Judges Classified" delivered by Collins J. Seitz, Chancellor of the State of Delaware.

New officers for the coming year are:

Robert J. McCandlish, Jr., of Fairfax, President; and William T. Muse, Dean of the University of Richmond Law School, President-Elect. Dean Muse had served the Association as Secretary-Treasurer for the past nineteen years. Charles A. Blanton II, of Richmond, was elected Secretary-Treasurer to succeed Dean Muse. To fill two vacancies on the Executive Committee, the Association elected Francis Nelson Crenshaw, of Norfolk, and Jackson L. Fray, of Culpeper. Martin P. Burks, of Roanoke, was re-elected delegate to the House of Delegates of the American Bar Association. The five Vice Presidents elected were: Piedmont—James H. Michael, Jr., of Charlottesville; Valley—Breckenridge C. Goodloe, of Staunton; Southwest—Archibald A. Campbell, of Wytheville; Tidewater—Leonard H. Davis, of Norfolk; Southside—John D. Epperly, of Martinsville.

The Junior Bar Section held its third annual meeting on August 6. Angus H. Macaulay, Jr., of Richmond, Chairman, presided at the business session which was followed by a reception for Section members and guests. The Section's first set of by-laws was adopted. Edward T. Caton III, of Virginia Beach, was elected Chairman for the ensuing year to succeed Mr. Macaulay. Henry Clinton Mackall, of Fairfax, was elected Vice Chairman, and Frank O. Meade, of Danville, was elected Secretary. The new by-laws provided for an Executive Committee of four. The Section elected the following to fill these positions: John E. Clarkson, of Norfolk; A. Hugo Blankingship, Jr., of Alexandria; John W. Gray, Jr., of Roanoke; and Walter J. McGraw, of Richmond.

The Annual Meeting was closed with a banquet which featured Erby L. Jenkins, of Knoxville, Tennessee, in a humorous address.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

ANTITRUST: Another October has come and the *Record of The Association of the Bar of the City of New York* again publishes (50 cents per copy, $4.00 per year to non-members, 42 West 44th Street, New York 36, New York) the annual lecture of Professor Milton Handler of Columbia Law School on the year's antitrust developments. It was delivered on June 9, 1960, to the Section on Trade Regulation of that Association's Committee on Post-Admission Legal Education.

On Monday, August 29, before the Antitrust Section of our own Association, the other professorial giant of the antitrust world, S. Chesterfield Oppenheim, also reviewed some of the year's developments. His remarks will appear in due course when the proceedings of the Section at its Washington meeting are printed. Non-members of the Section can buy these reports from the Association's headquarters in Chicago at $2.50 a copy when they are available later this year. Section members receive them free.

Both Milton and Oppie discuss the *Parke Davis* decision of the October, 1959, Term. And both also discuss the decision of Circuit Judge Leonard Moore in *Warner* v. *Black and Decker*, 277 F. 2d 787, at the Second Circuit in May, 1960.

The question, of course, is whether the recent *Parke Davis* decision of the Supreme Court of the United States, written by Mr. Justice William Brennan, overrules the doctrine of the *Colgate* case (*United States* v. *Colgate*, 250 U. S. 300, 63 L. ed. 992, 39 S. Ct. 465, 7 A.L.R. 443).

As Oppenheim sees *Colgate:* First a seller can make a written announcement to his customers that he will refuse to sell one who does not maintain his resale price but he must make clear that the customer is free to abide or depart from the schedule; second, the seller must instruct his own organization to follow *Colgate* to the letter; and third, the seller must always act unilaterally in refusing to sell a violator.

As Handler sees the *Colgate* doctrine, it has three aspects: (1) a single trader may select his customer; (2) a manufacturer may "suggest" to his distributors and dealers "the prices at which his products may be resold"; and, (3) he may not go beyond this.

Professor Oppenheim points out:

> The basic issue will still turn on findings of fact, usually based on circumstantial evidence resolving the question whether the conduct of the seller is within the immunity of the *Colgate* doctrine, or within the banned area of *Dr. Miles Medical*, 220 U. S. 373, 55 L. ed. 502, 31 S. Ct. 376, *Beech-Nut*, 257 U. S. 441, 66 L. ed. 307, 42 S. Ct. 150, 19 A.L.R. 882 and *Bausch and Lomb* 321 U. S. 707, 88 L. ed. 1024, 64 S. Ct. 805.

Oppie adds that *Parke Davis* compels a District Court to look for evidence indicating "combination and conspiracy on the horizontal plane" and "contractual arrangements on the vertical plane".

> In *Parke Davis*, "The significant principle" is that the defendant exceeded "mere announcement" and "simple refusal to deal." Abandoning "unilateral" action, Parke Davis employed "other means." The record dripped

"with Beech-nut flavor without protection from Colgate Gardol."

Oppenheim cautions that the manufacturer must observe meticulously the limitations in the *Colgate* doctrine or his failure so to do "may produce a record loaded with findings of fact as far from Doric simplicity as the architecture of the Guggenheim Museum in New York City".

So both Handler and Oppenheim conclude that the *Colgate* doctrine "is neither dead nor sterile".

Perhaps, but if both will allow me to heckle (and both in their excellent casebooks have taught me what little I know), does not *Dr. Miles Medical, Beech-Nut, Bausch and Lomb* and now *Parke Davis* rob a manufacturer of any effective power to police his resale prices? Is all he can do is telephone and say "Hello, Olo. I suggest you sell at my list prices"? Can he then refuse to sell? But if he talks to his jobbers or breathes a little, has he used "other means"?

No wonder not even Donald McKinnon could get the Second Circuit in *Warner* v. *Black* to uphold the dismissal of that complaint!

Milton Handler says it was because Leonard Moore "construed *Parke Davis* as having sapped *Colgate* of most of its *vitality*" and he says this is a "misinterpretation" and "goes far beyond the *Parke Davis* decision itself".

Calling attention to Judge Moore's statement that *Parke Davis* "has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise", Professor Oppenheim comments that the *Black and Decker* complaint contains "allegations which, if sustained, would prove the fatal 'other means' going substantially beyond *Colgate*".

However, Oppenheim complains that Mr. Justice Brennan was in error in *Parke Davis* "in charging that the District Court searched the record only for evidence of purely contractual arrangements" because the record "reveals that the District Court searched for combination or conspiracy, as well as express or implied contracts".

Professor Handler makes the same criticism of Justice Brennan:

> A measure of further confusion has now been introduced by Justice Brennan, who seemingly differentiates between an agreement and a combination.

Handler says he has many times studied the cases but has never found "a different meaning to combination and conspiracy". From which I infer he rejects the suggestion in *Parke Davis* that "in a vertical price-fixing case there can be illegality in a set of facts where there is no agreement but merely a combination between a seller and a buyer".

However, both pundits reserve their heaviest fire for the dissent. Handler complains:

> "the exaggerated language" in the dissenting opinion of Mr. Justice Harlan in which Justices Frankfurter and Whittaker joined "may lead lower courts to believe that the Court intended to overthrow . . . Colgate." Their "strictures" are "unmerited."

And Professor Oppenheim agrees:

> The majority did not announce a new legal standard but merely clarified. . . The irony of *Parke Davis* lies in the dissenting opinion. Three Justices, sincerely professing to save *Colgate* from oblivion, heaped coals upon fires they imagined the majority ignited to destroy *Colgate*.

These are two very valuable discussions but they leave me convinced that *Colgate* is a figment of a fair trader's imagination and cannot be effectively policed. Price cutters and jobbers laugh at "suggestions". Either you have an adequate fair trade law with no holes in it or you don't. *Dr. Miles Medical, Beech-Nut, Bausch and Lomb* and *Parke Davis* rob *Colgate* of any practical value.

Professor Oppenheim also discusses a topic dear to my heart—whether under Section 5 of the Federal Trade Commission Act, that august body may prosecute for an offense that does not rise or stoop to the indignity of a Sherman or Clayton offense.

In his paper, Professor Handler goes on to discuss a number of other topics.

First, he takes up the *Tampa Electric* case (*Tampa Electric* v. *Nashville Coal*, 276 F. 2d 766), a decision in the Sixth Circuit.

There Tampa, having eleven units that used oil, decided to build two new ones and use coal. It contracted to buy all (except for 15 per cent) of its requirements for the two new units for twenty years from Nashville, but remained free to buy coal from anyone if it converted its then eleven units to coal. However, if Tampa built four new units, it agreed to buy coal for them from Tampa for ten years but it was free to install oil. Tampa spent three million to install coal-burning equipment and the seller seven and one half million to supply Tampa. At that point, the seller breached the contract. Tampa sued and both the District Court and a divided Sixth Circuit Court of Appeals held that the contract violated Clayton 3 and was illegal.

Passing whether the *Tampa* decision be consistent with *Kelly* v. *Kosuga*, 358 U. S. 516, Milton Handler maintains it is wrong under the *Sinclair Gasoline Pump* case (*F.T.C.* v. *Sinclair*, 261 U. S. 463). He feels:

> The notion that Section 3 forbids

substantial as well as total exclusivity is particularly intolerable, when coupled with Standard Stations concept of quantitative substantiality as, indeed, it was coupled in Tampa Electric.

Second, every June, Handler twits defendants who take consent judgments rather than fight out with Justice "territorial security clauses" in dealer franchise agreements. Praising Volkswagen for contesting the point (*United States* v. *Volkswagen*, 182 F. Supp. 405) this June, he twits the Department for ducking the question and arguing the point was not present because "intertwined with illegal price restraints" which was what Judge Forman held in the District Court of New Jersey.

Third, of the many merger cases, Professor Handler discusses most thoroughly the *Brown Shoe* case (*United States* v. *Brown Shoe*, 179 F. Supp. 721, Missouri) which the Supreme Court has agreed to review. In Handler's view, the record "bristles with thorny questions of law" and, when the opinion of the Supreme Court comes down it ought to be interesting reading.

The Professor argues that the District Court in *Brown Shoe* used quantitative substantiality. Recalling that Brother Bob Bicks was, with Judge Stanley Barnes, a principal architect of the Attorney General's Committee Report which denounced quantitative substantiality, the pundit comments:

> The effort of the Department to foreclose any real review of the important questions which *Brown Shoe* presents is the most disturbing development I have encountered since these annual lectures were inaugurated.

Of course, fourth, the Professor discusses the *Du Pont-General Motors* decree which the Supreme Court is to review at its October, 1960, Term. He confesses:

> the greatest difficulty understanding how a court—even a court of equity—can assert jurisdiction [as Judge La Buy did with General Motors] against a party who has neither violated nor threatens to violate any law and who has breached no legal duty.

Handler says,

> this trend is symptomatic of the extreme stands that are currently being taken in antitrust enforcement—stands for which I can find no warrant in history, precedent or policy.

Fifth, by far the most interesting part of the Handler Annual Lecture is his discussion of *United States* v. *McDonough Co.*, 1959 Trade Cases, Par. 69,482 and 1960 Trade Cases, Par. 69,695, a judgment of United States District Judge Underwood in the Southern District of Ohio. The good Judge accepted:

> a plea of *nolo* but thereupon imposed jail sentences, without any advance notice to the defendants that such drastic punishment was in contemplation. McDonough was a price-fixing case in which five corporations and four corporate officers were joined as defendants.

It seems the defendants had originally pleaded guilty, asked to withdraw and plead *nolo* which was "reluctantly" permitted. The Justice Department recommended fines of five thousand dollars for the individual defendants and from fifteen to twenty thousand for the corporate defendants. The Judge added ninety days in jail.

When a lawyer for the defense objected and said he "had examined every antitrust case involving such a plea" and in advising his client "had found no instance in which a defendant had been sentenced to jail" after pleading *nolo*, the Court ruled that *nolo* was "equivalent to a guilty plea except that it does not constitute prima facie evidence in a private suit under Section 5 of the Clayton Act".

Reading this caused me to read myself. I mean that outstanding noncontroversial Chapter III on "Overlapping Jurisdiction" of F.T.C. and Justice (which urges the liquidation of

both and substitution of one Trust Buster for the present two) printed in "A Study of the Antitrust Laws", by Joseph W. Burns (Central Law Book Company, New York, New York, $10) and written by Miss Beate Bloch, a very able former student of mine at Cornell, Joe Burns and me. Suppressed after approval by a majority of the then Antitrust Subcommittee, the Burns report of the 84th Congress was privately printed by Mr. Burns. In Chapter III, Subdivision I, pages 109-115, it urges abolition of criminal antitrust suits.

I thought then and I think now that businessmen should not be sued criminally for antitrust offenses. Monograph Number 16 of the Temporary National Economic Committee (in my book the greatest contribution of that great lawyer and citizen, Senator Joseph C. O'Mahoney, of Wyoming), reaches substantially the same conclusion. Presented to Senator O'Mahoney by Theodore J. Kleps, his Economic Adviser, on September 5, 1940, and written by the one and only Professor Walton Hamilton of Yale Law School with Miss Irene Till, Monograph 16 is a classic discussion of the problem.

Commenting that to prosecute business leaders criminally creates such a bad atmosphere that the imprisonment provision has become "futile", Professor Hamilton and Miss Till pointed out that "In 5 decades the number of criminal actions has run to 252, yet in only 24 did the Court impose criminal sentences . . . Eleven of the cases involved trade unions; 96 out of 102 defendants involved served sentences which ran from a few months to 2 years . . . out of the whole number, a single suit proclaims that along with the racketeer and the trade union official, the respectable man of business goes to jail for restraint of trade" (pages 78-79).

In other words, Eugene Debs and other labor leaders, have been sentenced to jail under the antitrust laws, but down to 1940 only eight businessmen, until Judge Underwood threw four into the clink, making the count now an even dozen.

Actually these criminal prosecutions have done more harm than good. The respectable man is blackened before and without trial as a dirty criminal in his home town. The Department lets him "cop" a plea which he does frequently, when innocent, because of the hideous expense of trial. But when tried, the court is powerless to award against the corporation defendants anything but a fine. Frequently, the second civil suit fails or is never brought or, if begun, discontinued.

Professor Handler calls attention to the dismissal last year of two criminal suits, the *Tulsa* case by Judge Savage (*United States* v. *Arkansas Fuel*, 1960 Trade Cases, Par. 69, 619, N.D. Okla.) and the *Salk Vaccine* case (*United States* v. *Eli Lilly & Co.*, 24 F.R.D. 285) by Judge Forman in New Jersey.

I agree with Professor Handler that rulings and policies discouraging the use of traditional methods of settling litigation on a reasonable, fair and realistic basis "do not really advance the cause of antitrust or promote the public interest" and I go further and question the wisdom of any criminal antitrust suits.

One complaint. With all I have to do, why do Oppie and Miltie write such provocative and interesting articles that I can't put down?

PRESIDENT GRANT AND CHIEF JUSTICE CHASE. Gerald T. Dunne, is Counsel to the Federal Reserve Bank of St. Louis, but after reading his piece on Grant and Chase also entitled "A Footnote to the Legal Tender Cases", I am not sure but he has missed his calling. He ought to write legal history. He does it so well.

Wise Harry Rosenfield, of the Washington, D. C., Bar, once remarked to me that this department has some merit because of its polemics. After I looked it up, I was not so inflated as when he said it.

Thus, so correctly dubbed a polemicist, I think I know another, when I see one. I am glad to welcome Brother Dunne to the club even though Harry Rosenfield thinks we're a vanishing race. His piece on Grant's appointing Strong and Bradley to the Court and the subsequent reversal of the Legal Tender Cases is one of the most interesting I have ever read. Of course, Grant did not pack the Court. He simply appointed judges who would declare the Legal Tender Act constitutional and reverse Chief Justice Salmon P. Chase who, as Secretary of the Treasury, had approved the legislation.

Perhaps, the best part of the piece is the pathetic picture he paints of Mr. Justice Grier, who was asked by all his colleagues to resign. Dunne also touches on Grant's getting Senator Frelinghuysen to vote for Johnson's impeachment and with considerable perspective weighs the contributions of both Grant and Chase.

You will find this article in the *St. Louis University Law Journal* (Vol. 5, No. 4, Fall, 1959, pages 539-553; address: 3642 Lindell Boulevard, St. Louis 8, Missouri; price: $1.50). Richard L. Hughes, the editor, and Professor Lawrence M. Friedman, the faculty adviser, attest the polemic quality of the article of Gerald T. Dunne, a St. Louis undergraduate but a Georgetown lawyer. Dunne's piece is the only one in the issue to carry this caveat: "The opinions expressed are personal to the author" (page 539). Perhaps. Can't Harry Rosenfield and I share them?

Classified

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